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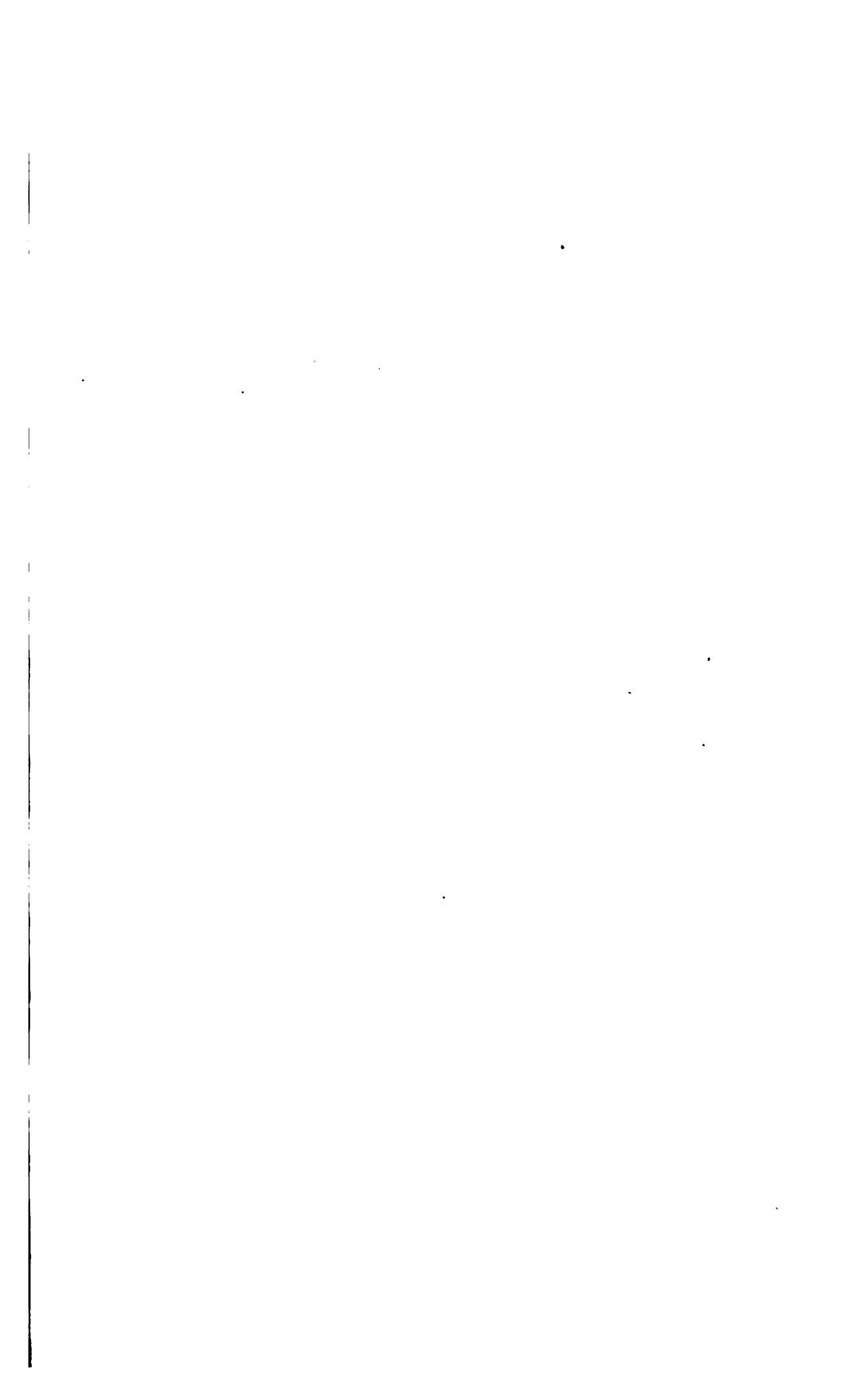
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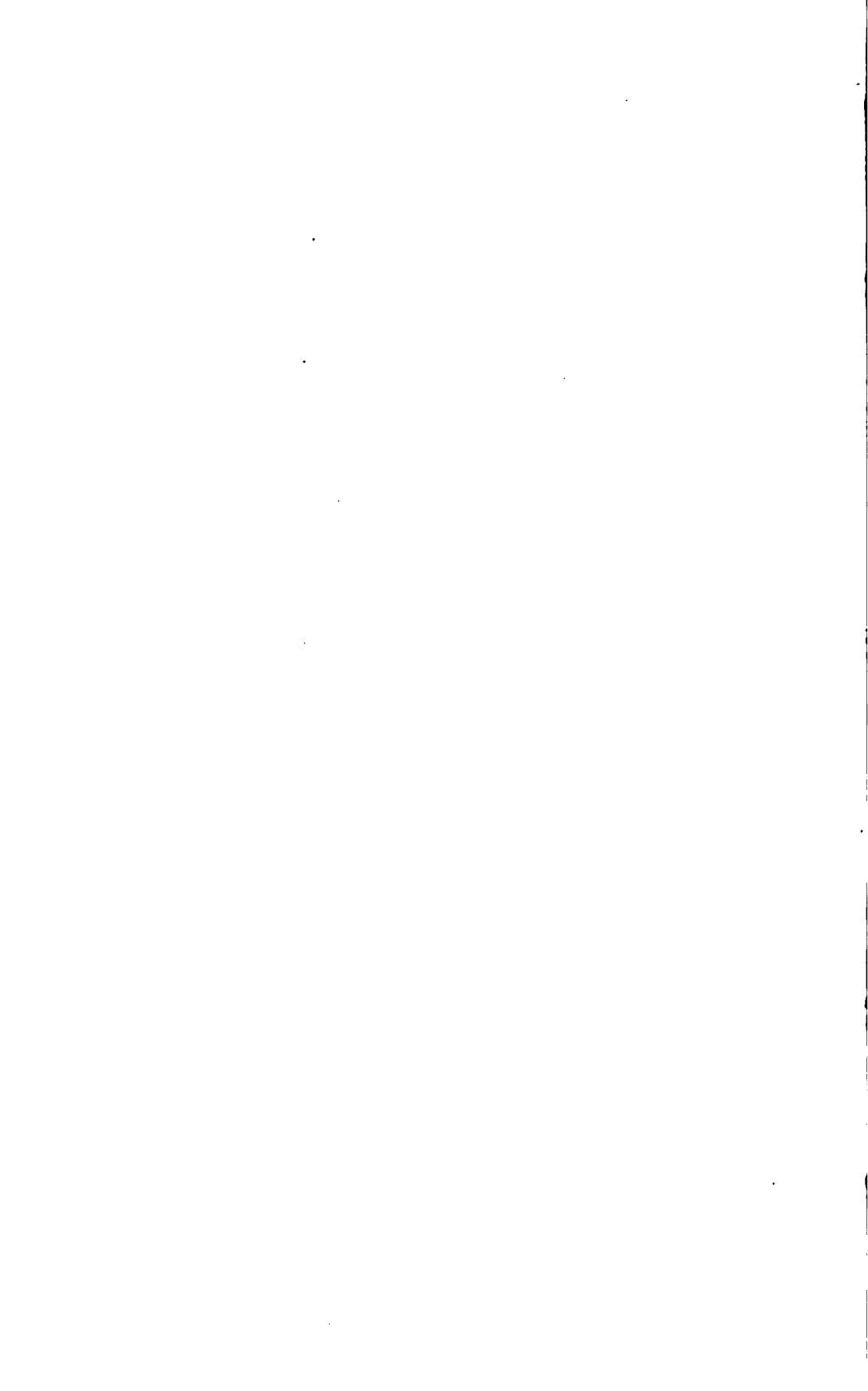
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*U. S. Dist. Court of Appeals.*

# REPORTS OF CASES

HEARD AND DETERMINED BY

THE LORD CHANCELLOR

AND THE

COURT OF APPEAL IN CHANCERY.

BY

J. P. DE GEX AND H. CADMAN JONES, Esqs.,

BARRISTERS AT LAW.

EDITED,

WITH NOTES AND REFERENCES TO AMERICAN LAW,  
AND SUBSEQUENT ENGLISH DECISIONS,

BY

J. C. PERKINS.

VOL. II.

1858.

BOSTON:

LITTLE, BROWN, AND COMPANY.

1873.

*a.5-5375*  
**JUL 8 1901**

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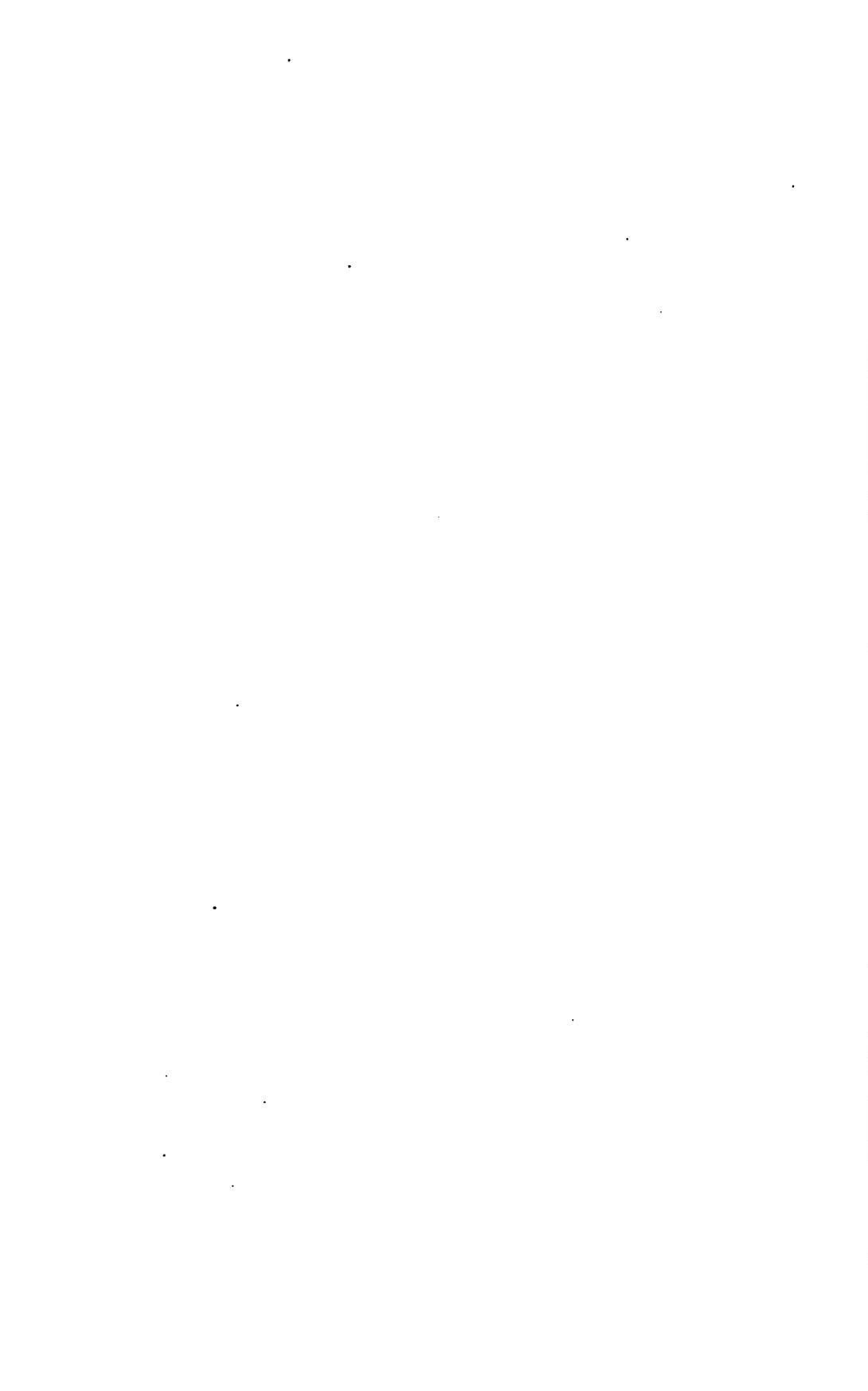
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# **REPORTS OF CASES**

**ARGUED AND DETERMINED**

**IN THE**

**HIGH COURT OF CHANCERY.**



# REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

## HIGH COURT OF CHANCERY.

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ROBERTS *v.* CROFT.

1857. December 10. Before the Lord Chancellor Lord CRANWORTH.

A lady lent money to her solicitor upon a deposit of title-deeds, with a written memorandum. The deeds thus deposited did not comprise the later title-deeds, and so did not show that the depositor had any interest in the estate. The solicitor afterwards deposited the remaining deeds with his bankers to secure the balance of his account: *Held*, that the lady had not, in omitting to call for the other deeds, been guilty of such gross negligence as to postpone her security to that of the bankers.<sup>1</sup>

THIS was an appeal by J. P. Bult and J. F. Bult, bankers, from so much of a decree of the Master of the Rolls as postponed an

<sup>1</sup> See Layard *v.* Maud, L. R. 4 Eq. 397; 2 Sugden V. & P. (8th Am. ed.) 768; Todd *v.* Studholme, 3 K. & J. 324; 19 Beav. 511; Perry Herrick *v.* Attwood, 25 Beav. 205; S. C., 2 De G. & J. 21; Hunt *v.* Elmes, 28 Beav. 631; S. C., 2 De G., F. & J. 578; Lacon *v.* Allen, 3 Drew. 579; 2 Story Eq. Jur. § 1020 *a*. As to the effect of a deposit of title-deeds to create an equitable mortgage, see farther, 4 Kent (11th ed.), 150, 151, and notes; Russel *v.* Russel, 1 Bro. C. C. (Perkins's ed.) 269 and cases cited; 1 Lead. Cas. in Eq. (3d Am. ed.) 649 [541] *et seq.* and notes to Russel *v.* Russel; Rockwell *v.* Hobby, 2 Sandf. Ch. 9; Welsh *v.* Usher, 2 Hill Ch. 166, 170; Williams *v.* Stratton, 10 Sm. & M. 418; 2 Story Eq. Jur. § 1020 *et seq.*; *Ex parte* Coming, 9 Ves. (Sumner's ed.) 115, note (*a*); *Ex parte* Langston, 17 Ves. (Sumner's ed.) 227, note (*a*), 230, 231; Mandeville *v.* Welch, 5 Wheat. 227; 2 Dart V. & P. (4th Eng. ed.) 801.

equitable mortgage to which they were entitled on an estate of C. R. Roberts, deceased, to another equitable mortgage vested in a Miss Willes. The case is reported in 24 Beav. 223.

In January, 1838, Roberts, who was a solicitor, borrowed from Miss Willes, who was a client of his, the sum of 2000*l.* and deposited with her certain title-deeds with a list (*a*) thereof, at the foot of which was written the following memorandum :—

\* 2     “Memorandum. The above-mentioned deeds are \* deposited with Miss Anne Willes as a security for the sum of 2000*l.* and interest at the rate of 4*l.* 10*s.* per cent per annum, to be held by her until repayment of the same, with all costs, charges, and expenses which may hereafter be occasioned by non-payment of such principal money and interest as aforesaid. As witness my hand this 6th day of March, 1838.

“CHARLES R. ROBERTS, *Solicitor*,  
“35, Seething Lane, 1838.

“N. B.—The interest to commence from the 22d day of January, 1838.”

The deeds thus deposited were an incomplete set of deeds relating to an estate in Caernarvonshire belonging to Roberts, and did not show that he had any interest in the property. They commenced with a settlement of 24th August, 1768, made on the marriage of Robert Williams, and carried down the title regularly to deeds of the 20th and 21st of March, 1826, made to lead the uses of a recovery suffered by John Williams the elder and John Williams the younger; after which followed indentures of lease and release of the 21st and 22d of December, 1826, being a mortgage in fee by John Williams the elder and John Williams the younger to a Mr. Hughes to secure 1300*l.* No subsequent deeds were either comprised in the list or actually deposited with Miss Willes.

On 28th March, 1839, Roberts, being indebted to the Messrs. Bult on the balance of his banking account, deposited with them by way of equitable mortgage, with a written memorandum, title-

(*a*) The heading of this list was as follows: “A schedule of title-deeds delivered by the Rev. Hugh Hughes to Mr. Read, relating to an estate situate in the parish of Tydweilog, in the county of Caernarvon, late the property of Mr. Williams of Houndsdale.”

deeds relating to various properties of his. Among them were the following deeds relating to the Caernarvon estate ; viz., a deed of 16th March, 1765 ; duplicates of the above indentures of 24th August, 1768, and 20th and 21st March, 1826, but no intermediate deeds ; indentures of lease and release of 12th \* and \* 3 13th April, 1833, made between the assignees in bankruptcy of John Williams the elder and John Williams the younger of the first part, the governor and company of the Copper Miners of the second part, John Williams the younger of the third part, and C. R. Roberts of the fourth part ; indentures of lease and release of 5th and 6th May, 1835, made between John Williams the younger of the first part, C. R. Roberts of the second part, and Rev. G. Roberts of the third part ; and indentures of lease and release of 26th and 27th February, 1838, being a reconveyance by Hughes, the above-mentioned mortgagee, to C. R. Roberts.

In the administration of the estate of Roberts, the question arose which of these two equitable mortgages was entitled to priority, and the Master of the Rolls decided that there was no ground for depriving Miss Willes of the advantage derived from priority of date.

The Messrs. Bult appealed.

*Mr. Roundell Palmer* and *Mr. Goldsmid*, for the appellants.—Miss Willes was guilty of gross negligence in allowing Roberts to retain the most material deeds, giving to her no deeds which showed that he had any interest in the property. *Hewitt v. Loosemore* (a) clearly lays down the rules of law on the subject of postponement for negligence. Roberts was Miss Willes's solicitor, and she is affected by his knowledge that none of the most material deeds were delivered to her. The fact that he had an interest does not alter the case. *Majoribanks v. Hovenden*. (b) We do not say that a person taking a mortgage by deposit is bound to examine whether the \* deposited deeds form a complete \* 4 title, but we submit he is bound to see whether they show an apparent title in the depositor. It is gross negligence to accept, without inquiry, a deposit of deeds which show no shadow of title in the depositor ; and if Miss Willes had made inquiry, she would either have got the other deeds, or have been informed that Rob-

erts was keeping them to raise money on them. We took deeds showing a good *prima facie* title, and could not be expected to ask for more. *Waldron v. Sloper*, (a) *Worthington v. Morgan*, (b) and *Rice v. Rice* (c) strongly support our case. At all events we had a right to retain the deeds; and as we have consented to a sale, which could not have been effected had we withheld them, our costs ought to be allowed.

*Mr. Selwyn* and *Mr. Baggallay*, for Miss Willes.—Miss Willes has priority in point of time, and is not to be postponed, unless she has been guilty of negligence so gross as to be tantamount to fraud, nor unless the appellants are free from negligence. Now they were negligent, for they omitted to ask for all the deeds; they had a deed reciting Hughes's mortgage, yet they never asked for that mortgage: had they done so they would have discovered that it was deposited with us. There was no gross negligence on our part. *Colyer v. Finch*. (d) As to constructive notice from Roberts being Miss Willes's solicitor, we are within the exception laid down in *Kennedy v. Green*, (e) and recognized in *Hewitt v. Loosemore*. (g) There was negligence on both sides; it is difficult to balance degrees of negligence; but the fact that the appellants were independent men of business, and Miss Willes a \* 5 lady dealing with her own \*solicitor, will make the Court lean against the appellants on that head.

*Mr. Goldsmid*, in reply, referred to *Hewitt v. Loosemore* (g) and *Atterbury v. Wallis*, (h) as showing that the doctrine of *Kennedy v. Green* did not apply in favour of the respondents.

THE LORD CHANCELLOR.—Each of the deposits in this case was accompanied by a written memorandum signed by the depositor. In each case, therefore, it is clear that the depositor obtained an effectual charge on the land. There have been differences of opinion and practice as to the rights of an equitable mortgagee, it being a question whether he is to be treated as having a right to call for a legal mortgage, or as having only a right to a sale.

- (a) 1 Drew. 193.
- (b) 16 Sim. 547.
- (c) 2 Drew. 78.
- (d) 5 H. L. Cas. 905.

- (e) 3 M. & K. 699.
- (g) 9 Hare, 449.
- (h) 2 Jur. N. S. 1177.

It is not necessary in the present case to discuss that question, it being here plain that in each case, whether the deposit was complete or incomplete, the written memorandum gave the depositor a security, the benefit of which might be obtained in one or other of those modes.

That being so, if there had been no deposit of deeds in either case, the matter would have stood thus: Miss Willes had an equitable security created in 1838, whereas that of the bankers was created in 1839, and if there were no more in the case it would clearly be governed by the maxim, "Qui prior est tempore potior est jure." Deposits, however, were made, some of the deeds having been deposited with Miss Willes along with the memorandum in 1838, the residue with the Messrs. Bult in 1839, those deposited with Miss Willes forming the \*earlier \*6 part of the title and not showing that Roberts had any interest in the property. Does this vary the case? When Miss Willes took her security she acquired a right which was good against all other merely equitable claimants whose titles had a later origin, unless she was guilty of gross negligence (for in this case fraud by her is out of the question) enabling Roberts to commit a fraud by holding himself out as unencumbered owner of the property. I am of opinion that she was not guilty of such gross negligence. [His Lordship here read the memorandum of March, 1838.] This memorandum amounted to a representation by Roberts, that the deeds which he deposited with her were all the material deeds relating to the estate. In truth, they were not so, for the most material deeds were retained by him; but was it, under these circumstances, gross negligence on her part to leave them with him? I think it was not, for she was assured by the memorandum that she had the title-deeds, which she would naturally understand to mean all the deeds which it was necessary for her to have. Roberts was guilty not of negligence, but of fraud; Miss Willes, in my opinion, was not guilty of either, and her title being prior in point of time must prevail. Each party will add his costs exclusive of the costs of the appeal to his debt. I am of opinion that the decree is altogether right, and that the appeal ought to be dismissed with costs.

\* 7

## \* LINDSAY v. TYRRELL.

1857. December 16. Before the Lord Chancellor Lord CRANWORTH and the LORDS JUSTICES.

An order for an infant to sue *in formā pauperis* by his next friend was obtained *ex parte* on an affidavit by the infant in the common form as to his own poverty: Held, that such an affidavit was clearly insufficient, and that the order had rightly been discharged with costs.

Whether such an order might not properly be made, if special grounds were shown, *quare*.<sup>1</sup>

THIS was a motion by way of appeal from an order of the Master of the Rolls discharging with costs an order admitting the plaintiff to sue *in formā pauperis* by his next friend.

The order admitting the plaintiff to sue *in formā pauperis* by J. T. Lindsay, his next friend, was made *ex parte* on 16th April, 1857, by the Lord Chancellor, who at the same time authorized the Master of the Rolls, to whose Court the suit was attached, to deal with the order as if made by himself.

The only affidavit in support of the application for this order was one sworn by the plaintiff himself on 27th March, 1857, before the bill was filed. By this affidavit he deposed that he was not worth 5*l.*, his wearing apparel and the subject-matter of the suit excepted. His Lordship made the order under the impression that various statements made to the Court by way of argument were facts verified by affidavit.

On 28th May the Master of the Rolls discharged the order of 16th April with costs to be paid by the next friend. On 8th June the next friend filed an affidavit that he was not worth 5*l.*, his wearing apparel and the subject-matter of the suit excepted.

The appeal motion was opened before the Lords Justices, but at their desire came on to be disposed of by the full Court.

\* 8      \* Mr. A. H. Louis, for the motion.—The Master of the Rolls discharged the order on the ground that it was unintelligible, and that a next friend not liable for costs was a contradiction;

<sup>1</sup> See 2 Dan. Ch. Pr. (4th Am. ed.) 1474 and n. (9).

but I submit that the meaning of the order is quite clear, that the next friend should, in conducting the suit, have the privileges of a pauper, and that there is nothing contradictory in this. There is direct authority at law for suing in this way: *Bryant v. Wagner*; (a) and a Court of Equity will not show less favour than a Court of Law to an infant. There is nothing against me but a dictum of Lord THURLOW in *Anon.* (b) The cases as to married women indirectly support my contention. *Dowden v. Hook.* (c) The foundation of the right to sue *in forma pauperis* is generally referred to 11 Hen. 7, c. 12, and I submit that the present case is within the words of that statute. If orders of this kind are not to be made, an infant who cannot procure a person of substance to be his next friend — which an infant in the lower classes seldom can — may be deprived of his rights.

*Mr. Smythe*, for the defendant. — The order was rightly discharged, having been obtained merely on an affidavit that the infant was not worth 5*l.* If such an affidavit is enough, the eldest son of a rich gentleman may be admitted to sue *in forma pauperis* by his father as his next friend.

*Mr. Louis*, in reply.

THE LORD CHANCELLOR. — I am of opinion that the order of the Master of the Rolls is right. Liberty was expressly given to him to \* deal with the order made here as if it had been made \* 9 by himself; and I am of opinion that that order was rightly discharged. It was made solely on an affidavit by the infant that he was not worth 5*l.*, and such an affidavit was no foundation for such an order. In making that *ex parte* order I intended to raise the question, so that it might be decided upon argument, whether, where an infant could not obtain any one but a pauper as his next friend, an order for the next friend to be at liberty to conduct the suit *in forma pauperis* was not proper. It has been said, that if the suit is to be a pauper suit a next friend is improper, and that the matter ought to have been brought before the Court by special application. No doubt in such a case a special application is necessary; but I am by no means clear that the result of such an

(a) 7 Dowl. P. C. 676. (b) 1 Ves. Jr. 410. (c) 8 Beav. 399.

application might not be to allow the next friend to sue *in formâ pauperis*. There must be some means of enabling an infant who cannot obtain a solvent next friend to assert his rights, the only question is in what form. This question, which I intended to be raised, has not been raised, since no affidavit was filed in support of the application, except an affidavit that the infant himself was not worth 5*l*. I do not entirely agree with the opinion attributed to the Master of the Rolls, that a next friend without liability to costs is a contradiction in terms, for though a next friend is in general liable to costs, "next friend" does not mean a person to answer costs,<sup>1</sup> but a person who undertakes to conduct the suit on behalf of the infant. The order, however, having been made on plainly insufficient materials was properly discharged, and the appeal motion must be refused.

THE LORD JUSTICE KNIGHT BRUCE.—In this more than frivolous case, which has occupied so much of the time of the \*10 Court, the Master of the Rolls \*rightly treated as insufficient the only affidavit on which the order that he discharged had been made. I am, however, of opinion, with deference to his Honor, that the order should have been discharged without costs, and that there ought to be no costs of the appeal.

THE LORD JUSTICE TURNER.—I think that the order was rightly discharged with costs as having been plainly irregular. A special case was required, but none was made. Moreover, the only affidavit in support of the application for the order was, in fact, no affidavit at all, for it was filed before there was any bill on the file. I think that the total irregularity of the order made it right that costs should be given when it was discharged.

<sup>1</sup> See 1 Dan. Ch. Pr. (4th Am. ed.) 37, note (8); *Fulton v. Roosevelt*, 1 Paige, 178. A *prochein ami*, as such, is not liable for costs. *Crandall v. Slaid*, 11 Met. 288.

In the Matter of The WELSH POTOSI MINING COMPANY  
(Limited).

BIRCH'S CASE.

1857. December 16. Before the Lord Chancellor Lord CRANWORTH and the  
LORDS JUSTICES.

B., a shareholder in a mining company on the cost-book principle, retired from it under a provision in the cost-book enabling a shareholder to surrender his shares. A few weeks afterwards, the company was registered under 19 & 20 Vict. c. 47, and B.'s name was entered in the register and returned in the list of shareholders. An order having been subsequently made for winding up the company, the commissioner placed B.'s name on the list of contributories: *Held*, that B.'s name ought never to have been on the register of shareholders, and ought to be removed from it under the power given by 19 & 20 Vict. c. 46, § 25, of amending the register, and that it ought also to be removed from the list of contributories.<sup>1</sup>

Whether the name of a registered shareholder can be removed from the list of contributories without an amendment of the register, *quare*.

THIS was an appeal by Mr. Birch from a decision of Mr. Commissioner FANE, placing his name on the list of contributories of the above-named company.

The company was originally established in September, 1853, on the cost-book principle. In March, 1854, Mr. \* Birch \* 11 took fifty shares, twenty-five in his own name and twenty-five in the name of his wife. By the tenth of the rules of the company it was provided, that any shareholder might determine his liability upon giving notice in writing to the purser of his desire of giving up his interest in the company, and also upon depositing with the purser the certificates of his shares. On the 2d of April, 1857, Mr. Birch, being desirous of determining his connection with the company, gave the required notice in writing and deposited the certificates of his shares with the purser. An objection was, however, taken that calls were due on the shares. Mr. Birch paid the amount demanded, and on the 19th of May a

<sup>1</sup> See 1 Lindley Partn. (Eng. ed. 1860) 108, 135, 380, 612; 2 *ib.* 1132, 1154, 1155; Lofthouse's Case, *post*, 69; Bodwin United Mines, 23 Beav. 370; Whittet's Case, *post*, 577.

receipt was given to him. The purser, however, continued to send notices to him as a shareholder, and on the 4th of June, 1857, his solicitors wrote to the purser to the following effect: "Do you not intend ever to strike out the names of Mr. and Mrs. Birch from the list of adventurers in the cost-book or share register? They have done every thing required by the rules to put an end to their connection with the company, but continue to receive notices from you as shareholders."

On the 26th of June, 1857, the company was registered under the 19 & 20 Vict. c. 47, and the name of Mr. Birch was entered in the register of shareholders and in the list sent to the registrar. On the 23d of July, 1857, an order was made for winding up the company, and the commissioner, in settling the list of contributories, placed the name of Mr. Birch upon it. Mr. Birch presented a petition by way of appeal to have his name removed from the list.

\*12 *Mr. Giffard* and *Mr. Pontifex*, for the petitioner, \* referred to *Fenn's Case*, (a) and contended that Mr. Birch's liability had ceased in April or May, 1857.

*Mr. Selwyn* and *Mr. Roxburgh*, for the official liquidator. — The commissioner was right in placing Mr. Birch on the list of contributories, since his name was found on the register of shareholders.

[The Court here suggested that the proper application would have been to amend the register under 19 & 20 Vict. c. 47, § 25, and it was by consent agreed that the case should be treated as if an application for that purpose was before the Court.]

Such an application is too late. Birch ought to have taken active steps at once to get his name removed. Credit is given to the company on the faith of the names appearing on the register, and delay is therefore important. Birch must be taken to have waived his notice of relinquishment.

*Mr. Giffard*, in reply, referred to the letter of the 4th June, 1857, as showing that Birch could not be considered bound by delay or acquiescence.

(a) 4 De G., M. & G. 285.

THE LORD CHANCELLOR.—The company had no right to place the name of Mr. Birch on the register of shareholders. By the 2d of April, 1857, he had taken the proper means to dissolve his connection with the company. After that it was objected that calls were due on his shares, and on the 19th of May he paid what was claimed. Then his solicitors wrote the letter of the 4th of June, 1857, the substance of which was to say that he had nothing to do with the company, and that notices ought not to be sent to him. Under the original rules \* he had a right to retire, \* 13 and did so. The company, therefore, had no more right to put his name on the list of shareholders than that of any mere stranger. Whether the commissioner was wrong in placing his name on the list of contributories, I doubt, for the commissioner had no power to take his name off the list of shareholders, though I do not mean to decide that the commissioner was right. The name of Mr. Birch, however, ought not to remain on the list of shareholders, and it must be removed both from that list and the list of contributories. The order must be made both in chancery and in bankruptcy.

The Lords Justices concurred.

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#### PELL v. DE WINTON.

1857. December 10, 17. Before the Lord Chancellor Lord CRANWORTH.

A mortgage was made for securing the re-transfer of a sum of stock to the trustees of a will. The third share of a *cestui que trust* in the stock was afterwards by his marriage settlement vested in trustees, who had power to give receipts, to invest in government or real security, and to vary investments. Part of the mortgaged estate was afterwards sold for less than the value of the stock lent, and one-third of the price was paid in cash to the trustees of the marriage settlement: *Held*, that the estate was not discharged, there being no evidence that the cash had been duly invested, or that the trustees received cash instead of stock, in order to invest on real security.<sup>1</sup>

*Semble*, that if the purchase-deed had contained a recital that the trustees of the

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<sup>1</sup> See Lewin Trusts (5th Eng. ed.), 262, 263, 333, 351.

settlement had determined to invest the money on real security, they need not have received it in stock, but their receipt for it in cash would have been a good discharge.

THIS was an appeal by the plaintiff in a suit for specific performance from a decree of Vice-Chancellor STUART, so far as it allowed an objection taken by the defendant to the title, subject to which objection the title had been accepted.

The circumstances which gave rise to the objection were as follows. The property in question had formerly been purchased in 1815 by Charles Claude Clifton, \* and, in order to enable him to complete the purchase, he borrowed from Nicholas W. Lewis and Frances, his wife, and William Lucas, who were the trustees of the will of Thomas Young, the sums of 14,498*l.* 1*s.* consols and 11,068*l.* 1*s.* 9*d.* reduced bank annuities, forming part of Young's residuary estate. To secure the repayment he demised to them the purchased property, along with other property, for a term of 1000 years, subject to a proviso for cesser if he should re-transfer the stock on or before 1st August, 1820, and in the mean time pay them interest equal to the amount of the dividends on the stock. It appeared on the face of this deed that the mortgagees were the trustees of Young's will, and were lending the trust funds.

At the time when this mortgage was made, the trust estate of Thomas Young (subject to certain annuities, which afterwards expired, and to a power of appointment, which afterwards determined without ever having been exercised) was held on the following trusts; viz., one-half belonged absolutely to the testator's daughter Frances James, the other moiety had been settled on the marriage of a deceased daughter with Charles Claude Clifton, and she having died it was held in trust for him for life, and subject to his life-interest in trust for his three children, Eliza, Mary Ann, and Charles, equally.

The plaintiff purchased the property in question in 1848, at which time Frances James was still living and entitled to a moiety of the stock. The other moiety had been dealt with as follows: In 1831 Charles Clifton married, and by his marriage settlement, reciting that he was entitled under his mother's marriage settlement to certain moneys and to a share in a certain stock in the government funds expectant on the decease of his father, he

assigned to trustees all the moneys, stock, and \* premises to \* 15 which he was so entitled in reversion. In 1832, Mary Ann Clifton married Mr. Elliott, and by her settlement assigned to trustees her undivided third share of her mother's moiety of and in the several stocks, funds, and securities, money, leasehold and other personal estate, constituting the residue of the personal estate of Thomas Young. In the same year, Eliza Clifton died intestate, and Charles Claude Clifton took out letters of administration to her estate. By deed of 27th June, 1834, he assigned all the interest thus acquired in the trust funds to trustees, upon such trusts for Charles Clifton as he himself should appoint by will. By his will he appointed absolutely to Charles Clifton, and also devised to him absolutely the real estate now in question.

The sale to the plaintiff in 1848 was made by Charles William Clifton (who was Charles Clifton's heir) for 14,610*l.* The conveyance bore date 4th August, 1848, and was made between C. W. Clifton of the first part; Mary Jane Clifton and Frances James of the second part; C. F. Clifton of the third part; Maurice Barlow and Charlotte his wife, Edward Archball and Caroline Ann his wife, and Catherine Harriet Clifton, of the fourth part; Frances James, as Thomas Young's personal representative, of the fifth part; Frances James, as surviving trustee of Charles Clifton's marriage settlement, of the sixth part; Mr. and Mrs. Elliott of the seventh part; John Elliott and T. M. Scott, the trustees of their settlement, of the eighth part; the plaintiff of the ninth part; and W. H. Clifton of the tenth part; and it was thereby witnessed, that in consideration of 7305*l.* paid by the plaintiff to Frances James for her own use, at the request and by the direction of the parties of the second, third, and fourth parts, and with the privity and consent of the parties of the sixth, seventh, and eighth parts, and in consideration of 4870*l.* paid by the plaintiff \* to \* 16 Frances James, as such trustees as aforesaid, with the like concurrence of the parties of the second, third, fourth, fifth, seventh, and eighth parts, and in consideration of 2435*l.* paid by the plaintiff to J. Elliott and T. M. Scott, as such trustees as aforesaid, with the like concurrence of the parties of the second, third, fourth, fifth, seventh, and eighth parts, the parties conveyed to the plaintiff, in manner therein appearing, among other lands, the property to which this suit related.

Upon the deed were indorsed the following receipts: A re-

ceipt for 7305*l.* by Frances James, a receipt for 4870*l.* by Frances James, and a receipt for 2435*l.* by John Elliott and T. M. Scott. The deed was executed by the parties of the first eight parts.

The settlements of Charles Clifton and Mrs. Elliott contained the usual clauses giving the trustees power to invest in government or real securities, to give receipts, and to vary securities.

The present purchaser took the objection that it did not appear that the two-sixths of the purchase-money paid to Frances James, as surviving trustee of Charles Clifton's settlement, and the one-sixth paid to the trustees of Mrs. Elliott's settlement, had been properly invested according to the trusts of those settlements, urging that the trustees of those settlements had no right to receive their shares otherwise than in stock, and that, as those shares were paid to them in cash, the vendor was bound to show that they had been duly invested.

The cause came on to be heard before Vice-Chancellor STUART, and the objection, being fully raised in the pleadings, was \*17 argued at the hearing. His Honor made a \* decree for the usual reference as to title, with a declaration that the purchaser's objection was well founded. The plaintiff appealed.

*Mr. Malins* and *Mr. Erskine*, for the plaintiff, in support of the appeal.—The objection which the Vice-Chancellor has allowed is of the most technical description, and there is nothing substantial in it. No additional security to the *cestuis que trust* would have been gained by a transfer of the stock to the trustees of the settlements, for if they wished to commit a breach of trust they could have sold out the stock immediately after the transfer. Moreover, there was a power to vary securities, and it must be presumed that the trustees, in the exercise of their discretion, thought it fit to invest otherwise than in the funds, and therefore received payment in money instead of stock.

*Mr. Hobhouse*, for the purchaser, in support of the decision of the Vice-Chancellor.—The question is whether an obligation to re-transfer stock is proved to be discharged by producing a receipt for money signed by parties not beneficially entitled. I contend that either the form of a power to give receipts must be strictly complied with, or the due application of the money proved. The

form was not complied with ; a trustee received money, not stock ; it must therefore be shown that the substance was complied with by the money being duly invested. In matters of this nature, strict adherence to prescribed forms is required, e.g., as to the appointment of new trustees. *Nicholson v. Wright.* (a)

[THE LORD CHANCELLOR.—I cannot say that I should be prepared to follow the decision in that \*case, but I do not \*18 mean to give any definitive opinion upon it, as the point is not before me.]

Now, as to substance. It is contended on the other side that the transfer of stock into the names of trustees is mere matter of form, but that is not so : it is a substantial security to the *cestuis que trust*. Breaches of trust are much more frequently committed by misappropriating uninvested money than by calling in invested money on purpose to misappropriate it. As to the sum for which Mrs. Elliott's trustees gave a receipt, there is no sufficient proof that it came to their hands jointly ; it is recognized by the Court that trustees may join in receipts by way of conformity, so a receipt by the two is not conclusive evidence that the money came to the hands of the two. A receipt for cash, signed by the two, is therefore much inferior to proof that it was invested in the names of the two. I submit, therefore, that the title, as it stands, is bad ; but that if not bad it is doubtful. The confident opinion of the Vice-Chancellor that it is bad is enough to show that it is no better than doubtful, and doubt is enough. *Pyrke v. Waddingham.* (b)

*Mr. Erskine*, in reply.

THE LORD CHANCELLOR.—If this had been a case in which the infant children of Charles Claude Clifton had become entitled under the will of Thomas Young to a sum of stock, and the executors had lent that sum on real security on the terms that the mortgagor should replace the stock, and should in the mean time pay interest equal to the amount of the \*dividends, I should \*19 have been disposed to hold that such loan, being a transaction by which a less perfect security was substituted for a more

perfect one, without any pecuniary benefit to the *cestuis que trust*, would have been a breach of trust; and the mortgagor, having notice of the nature of the lenders' title, must have been deemed to have been a party concurring in that breach of trust. The consequence of this would have been that until the whole of the stock had found its way back to the executors, the mortgaged estate would have remained liable; and if a part of it were sold, and the purchase-moneys applied in partly replacing the stock, the residue of the estate would still have remained liable for the whole sum borrowed; for it could not be exonerated till the breach of trust was purged. Here, however, it appears probable that the mortgage was so adopted by parties who were competent to bind themselves that no one can now complain of it. The loan, therefore, being treated as a proper loan, the question is whether, when a portion of the estate was sold, the purchaser was bound to see, not merely that the money found its way to the trustees of the shares in the borrowed fund, but that it was properly invested. Was he bound to see that stock was purchased with the money? I shall give no opinion on that till I have read the papers in the cause.

December 17.

The Lord Chancellor, after stating the facts of the case prior to the sale to Mr. Pell, and showing how the title to the estate and to the sums secured upon it stood at that time, proceeded as follows:—

In 1848, Charles Claude Clifton's representative sold part of the estate to the present vendor, Mr. Pell, for the sum of 14,610*l.*

\* 20 The purchase-money was not paid to \*the representatives of Thomas Young, but one moiety of it was paid to Frances James in her own right, the other moiety was paid thus: two-thirds of it to the trustee of Charles Clifton's marriage settlement, and the other third to the trustees of Mrs. Elliott's marriage settlement. These payments were made in cash, and the question is, whether, as to the latter two payments, the estate is discharged.

The view of the case most favourable to the plaintiff is to treat the advance by the trustees of Young's will as made with the sanction of all the parties beneficially entitled. Assuming this to have been the case, I still think, though not altogether without doubt, that the objection taken by the defendant is well founded.

The proviso in the mortgage deed was for the re-transfer of stock, and the powers to give receipts, which are contained in the settlements, can only be construed to extend to what the trustees of those settlements were authorized to receive. There is, it is true, much force in the argument, that the trustees, having a power to vary securities, might properly have converted the stock into money, and that they therefore must be authorized to receive it as money instead of stock; and, had there been contained in the purchase-deed a recital that the trustees of the settlements were about to invest the money on real security, I should have been loth to say, that every thing of substance had not been complied with, and that their receipts were not sufficient discharges; for, in that case, it might properly have been assumed that they had, in the *bond fide* exercise of their discretion, received money instead of stock, so as to affect the investment on real security more conveniently and with less expense; but, in the absence of any thing to show that the trustees were exercising a discretion, or were intending to invest in securities of a different description, I am of opinion that it cannot be held \* that they were acting \* 21 properly in receiving money instead of stock. The objection, therefore, though somewhat refined, is, in my opinion, well founded, and the appeal must be dismissed with costs.

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### PERRY HERRICK v. ATTWOOD.

1857. December 17, 18, 21, 22, 23. Before the Lord Chancellor Lord CRANWORTH.

A. voluntarily gave to his sisters a mortgage to secure an antecedent debt. The sisters allowed him to retain the title-deeds, that he might be enabled to give a first mortgage to secure another debt, for which he was being sued by B. A. deposited the deeds with B. to secure that debt, and afterwards, without B.'s concurrence, got possession of them and mortgaged the estate to the plaintiffs for a considerably larger sum, and delivered the title-deeds to them, they having no notice of the mortgage to the sisters: *Held*, that the mortgage to the sisters must be postponed to that of the plaintiffs, for that the sisters, having, with a view to A.'s raising a certain sum in priority to their mortgage, put it into his power to represent himself as unincumbered owner, could not, as against the plaintiffs, who advanced money on the faith

of A.'s possession of the deeds, complain that A. had raised more than was agreed upon.<sup>1</sup>

*Semble*, that the mortgage to the sisters was void as against the plaintiffs under Stat. 27 Eliz. c. 4.

THIS was an appeal by Frances Attwood and Maria Attwood, two of the defendants, from a decree of the Master of the Rolls, postponing a mortgage held by them, and dated the 30th of January, 1848, but, as it appeared, executed in fact about the 4th of February, 1848, to certain mortgages of later date held by the plaintiffs.

The circumstances under which this mortgage was given were as follows: John Attwood, the mortgagor, was for some years previous to 1848 indebted to the trustees of the will of John Hawkins in the sum of 5000*l.*, and to the trustees of the marriage settlement of James Alexander Attwood in sums amounting to 10,600*l.* The trusts of the will and settlement were very similar, and in the events which had happened were for the three children of James Alexander Attwood deceased, viz., James Harrington

Attwood, Maria Louisa Attwood, and Mary Attwood, in equal \* 22 shares. These children in \* 1848 were minors. John Attwood had executed several deeds for securing the repayment of these sums, by which he covenanted to repay them at certain times; and upon default in payment, to give a mortgage security for them upon a competent part of his estate.

In the latter part of 1847 application was made to John Attwood for payment. He agreed to make the payment, and releases were prepared in anticipation of his doing so. He failed to fulfil his agreement, and on the 1st of January, 1848, the solicitors of the two sets of trustees wrote to require immediate payment, threatening proceedings at law. After some further correspondence, John Attwood, on the 10th of January, proposed to give a mortgage, which the trustees refused, and on the 11th of January they commenced actions against him for the recovery of the money. The writs were served on the 11th of January, and declarations delivered on the 22d. On the 26th the defendant served in each action a summons for time to plead in abatement, but these summonses

<sup>1</sup> See *Lloyd v. Attwood*, 8 De G. & J. 614; *Smith v. Evans*, 28 Beav. 59; *Layard v. Maud*, L. R. 4 Eq. 397; 2 Sugden V. & P. (8th Am. ed.) 766-770; *Roberts v. Croft*, *ante*, 1, note (1); 2 Dart V. & P. (4th Eng. ed.) 771, 772; *Rogers v. Jones*, 8 N. H. 270; *Hunter v. Walters*, L. R. 11 Eq. 318.

were abandoned on the 27th, and on the 1st of February pleas were delivered. On the 14th of February issue was joined, and notice of trial given in both actions.

At and for some years before the time of these transactions John Attwood was indebted to each of his three sisters, Frances Attwood, Maria Attwood, and Mrs. Troward, in the sum of 10,000*l.* How he became so it is not material to state. Mrs. Troward's 10,000*l.* was comprised in her marriage settlement, of which John Attwood was one of the trustees. Attwood paid her interest on this sum, but his other two sisters lived with and were handsomely maintained by him, which was taken as in satisfaction of the interest due to them. The mortgage in question was given for securing these three sums of 10,000*l.* each, and was prepared by Mr. Roger \* Williams Gem, the family solicitor, he, the \* 23 Misses Attwood, Mrs. Troward and the mortgagor himself being the only persons acquainted with the transaction. What passed between the parties as to this security may be best seen from the following account given by Maria Attwood herself in her affidavit filed in the cause:—

"The circumstances which led to the proposal for and preparation of the said indenture of mortgage were, as I have heard from my brother the said defendant John Attwood, and from such information believe, that he was desirous of making his will and arranging his affairs, and had consulted the said Roger Williams Gem thereon, and that the said Roger Williams Gem, knowing that the said John Attwood had engaged to give a security on his landed property, the bulk of which then consisted of the Hylands estate, for moneys which were due from him to the trustees of Mr. Hawkins's will and of his late brother's marriage settlement, suggested that the said John Attwood should give a security to me and my said sister, the defendant Frances Attwood, for the moneys due to me and my said sister, and also for the money forming the subject of the marriage settlement of my sister, the above-named defendant Catherine Troward, and that he the said John Attwood, having acquiesced therein, directed the said Roger Williams Gem to do what was necessary for that purpose.

"The said Roger Williams Gem spoke to me and my said sister, the defendant Frances Attwood, on the subject, and we expressed ourselves obliged to him for his attention to our inter-

ests, and stated, that we should leave it to him to do what was necessary to make us secure.

\* 24 "The said Roger Williams Gem had our confidence \* in the preparation of the said mortgage security, and he was left entirely to his own discretion both by myself and my said sister Frances Attwood, and also by my brother, the said defendant John Attwood, as I believe from his having told me so, and no other solicitor was employed by me or by my said sister in reference to the said indenture of mortgage.

"After the said deed of the 30th day of January, 1848, had been executed as before mentioned, the said Mr. Gem gave the same to me, saying, 'Here, Miss Attwood, is the security for you and your sister's money ;' the said deed was then enclosed in the paper cover produced, and shown to me at the time of swearing this affidavit, marked with the letter C. The words and figures '1848, Miss Attwood's security from her brother,' now appearing on the said paper cover, are in the handwriting of the said Roger Williams Gem, and were on the said paper cover at the time the same was given to me by the said Mr. Gem. The said Mr. Gem, at the time of handing me the said deed, made some further observation, to the effect, that the fortune of myself and sisters was made secure by the said deed, and advised me to take care thereof.

"From what the said Mr. Gem said to me, and also from the indorsement in the handwriting of the said Mr. Gem on the said paper cover, I believed that the said deed so given to me by the said Mr. Gem did constitute a valid, sufficient, and complete security for the sums of money therein mentioned, and that the said deed was the only document which it was necessary for me to have for the purpose of such security."

The mortgage thus executed was made between John Att-  
\* 25 wood of the first part, Frances Attwood and Maria \* Attwood of the second part, and Mrs. Troward of the third part. By this deed, after reciting to the effect that Attwood was indebted to Frances Attwood and Maria Attwood in the sum of 10,000*l.* each, and owed the like sum to the trust estate and settlement moneys of Mrs. Troward, in which she was interested for her sole and separate use, and that they had requested him to secure the payment of those sums by such mortgage as thereafter contained,

and that it had been agreed that for the purposes of that security, so far as concerned Mrs. Troward, the Misses Attwood should stand interested in her behalf, as fully and effectually as she, acting in her sole and separate right, could direct and authorize the same, and should receive and give discharges for all moneys payable to her in her own separate right, Attwood demised the Hylands estate to the two Misses Attwood for a term of 200 years, by way of mortgage, for securing to them the payment of 30,000*l.*, with interest at 4*l.* per cent. The operative parts of the instrument were in the common form of a mortgage by demise for 30,000*l.*, except that there was not any grant of the title-deeds.

This deed, as has appeared above, was upon its execution handed over to the Misses Attwood, but the title-deeds relating to the estate were not. Maria Attwood, by her affidavit, gave the following explanation of this: After stating how Attwood was indebted to the trustees of Hawkins's will and J. A. Attwood's settlement, as mentioned above, she proceeded to say: —

"I have also been informed by my said solicitor, and therefore believe, that at the time at which the said indenture of mortgage of the 30th day of January, 1848, was given, the greater portion of the moneys referred to in the last preceding paragraph of this affidavit were \* claimed to be still due, and that actions \* 26 at law having been threatened against the said defendant John Attwood for the recovery thereof during the year 1847, the said John Attwood, through the said Roger Williams Gem, his solicitor, agreed that he would pay off the said moneys or give a legal mortgage on the Hylands estate of the said John Attwood specifically for securing the same; and that not being prepared to pay the money at the time named, actions were commenced against the said John Attwood, and that it was thereupon arranged that the said legal and specific mortgage on the said Hylands estate should then be executed.

"I have been informed by my brother, the said John Attwood, and verily believe, that the title-deeds relating to the said Hylands estate were shortly previous to and on the 30th of January, 1848, in the hands of the said Roger Williams Gem for the purpose of giving effect to the proposed agreement for mortgage, and that they were shortly afterwards handed over to Messrs. Gem, Pooley and Beisly, the London agents of the said Roger Williams Gem,

on an express trust to hold the same for the purpose of the security to be given for the money sought to be recovered in the said actions, and that they accepted the same upon such trust, and I believe with full notice of the indenture of mortgage of the 30th day of January, 1848. My belief as to their having had this notice is founded on the confidence I had in the said Roger Williams Gem's integrity and correct mode of transacting business, and that he would do every thing necessary for the protection of myself and sisters, and confirmed by entries appearing in the document produced and shown to me at the time of swearing this affidavit, and marked with the letter E, and also from the contents of a document in the possession of my solicitor, purporting to be

a copy of a letter written by the said Roger Williams Gem

\* 27 \* to the above-named defendant William Spencer, and dated in or about the month of June, 1854.

"I have been advised and believe that the title-deeds relating to the said Hylands estate were not placed in the possession of myself and my said sister, Frances Attwood, because under the circumstances hereinbefore stated they could not be properly handed over to me and my said sister, and that the same were properly retained for the purpose of the security to be given for the moneys sought to be recovered in the said actions brought against the said John Attwood."

The only direct evidence on the point, however, went to show that the deeds were left in the possession of Attwood himself. This evidence was an admission made by Gem, who died before the institution of the suit, and deposed to by Mr. Spencer, the solicitor of Hawkins's trustees, in the following passage, which it is thought best to introduce here, though it refers to some matters of a later date than those mentioned above:—

"On the 21st day of February, 1854, I was informed by the said R. W. Gem that the said title-deeds to the said Hylands estate had been removed from the custody of the said Mr. Beisly or his firm. Up to that time I never had entertained any suspicion that such was the case, for the said Mr. Beisly had on several occasions, and in particular on the 11th day of May, 1853, stated to me that the said title-deeds were still in his custody, and had never been asked for. On my informing the said Mr. S. Beisly,

shortly after the said 21st day of February, 1854, of what the said R. W. Gem had said, he, the said Mr. Beisly, for the first time admitted that he had parted with the said title-deeds, and he then also \* for the first time informed me that there was a \* 28 mortgage of the said Hylands estate prior to the deposit of the said title-deeds with him under the said agreements, and that the said R. W. Gem knew that fact. On the 18th of May, 1854, I saw the said Mr. R. W. Gem, and I then charged him with this, and he on that occasion admitted that there was a mortgage on the said Hylands estate when the agreements of April, 1848, were entered into, and that he had prepared such mortgage; and he stated that it was a mortgage to the sisters of the said J. Attwood for a large sum of money, and that after making this mortgage he, the said R. W. Gem, tied up the said title-deeds and returned them to the said J. Attwood, by whom they were retained, and that he, the said R. W. Gem, never saw any thing of them again until he saw them at the office of the said Mr. Beisly, to whom they had been handed by the said J. Attwood."

The actions against Attwood were vigorously prosecuted till the 28th of February, 1848, on which day Attwood renewed his proposal to give a mortgage, and the plaintiffs in the action, finding that they were likely to be defeated on technical grounds, assented. On the 3d of March minutes of agreement for staying the actions on Attwood's giving security on the Hylands estate were signed, it being agreed that Attwood should forthwith deposit the title-deeds with Messrs. Gem, Pooley, and Beisly, the London agents of R. W. Gem. On the 7th of March the deeds were accordingly sent to them, and on the 24th of April, 1848, more formal agreements as to giving security were signed. No legal mortgage was ever executed, but the deeds remained in the custody of Gem, Pooley, and Beisly, with whom, according to the agreements, they were to remain until the completion of the security, and who held them for the purpose of giving effect to the security.

\* Shortly after these transactions, Attwood began to employ \* 29 Gem, Pooley, and Beisly as his solicitors. On the 7th of September, 1850, he mortgaged the Hylands estate for 15,000*l.* to Edward Cardwell and Charles Cardwell. The application for this loan was made through Mr. Beisly, the title was carefully investigated by the solicitors of the Messrs. Cardwell, who did not dis-

cover any thing to raise any suspicion of the existence of the incumbrances of 1848, and on completion the title-deeds were handed over to them. On the 24th of January, 1851, they advanced 5000*l.* more on the same property. On the 17th of May, 1851, Attwood mortgaged the equity of redemption to other parties for 3000*l.*, and on the 27th of August, 1851, to other parties for 2000*l.*, the incumbrances of 1848 still remaining concealed. On the 15th of September, 1851, Attwood mortgaged this, along with other property, to Bloxam and Mitchell, as trustees for Raikes, Currie, and others, for 40,000*l.*, subject to the above securities of 1850 and 1851.

In the latter part of 1851 Beisly applied, on the part of Attwood, to the solicitors of the plaintiffs for a loan on the security of the Hylands estate. The solicitors inquired and ascertained from the solicitors of Messrs. Cardwell (who were also solicitors to the parties who had advanced the 3000*l.* and 2000*l.*) that the deeds were in their possession, and that they had no notice of any prior incumbrances. They also made inquiries of the solicitors of Bloxam and Mitchell, and found that they had no notice of any incumbrances except the above-mentioned securities of 1850 and 1851. Beisly made a statutory declaration that no incumbrances except those of 1850 and 1851 had been created while he had acted as Attwood's solicitor, and Attwood himself made a declaration that the estates were not subject to any incumbrances except those mentioned in the schedule to the declaration. The

\* 30 \* schedule mentioned the securities of 1850 and 1851, and 5000*l.* mentioned as being due to "Mary Attwood, a minor," but did not notice the mortgage of the 30th of January, 1848, nor the agreements of March and April, 1848. From the materials in the cause there was no doubt that the 5000*l.* mentioned in the schedule was Mary Attwood's share of the 15,600*l.* due to the trustees, and that the reason why it alone was mentioned was that her brother and sister having come of age, John Attwood had made some arrangements with them as to their shares. The title appearing to be in other respects satisfactory, and the value sufficient, the sum of 6000*l.* was advanced by E. Barnard and Edgar Barker, the plaintiff, George Barker, being beneficially interested in it.

In 1853, Attwood's affairs were placed under inspectorship.

On the 22d of September, 1853, the mortgages of 1850 and

1851, prior to that to Bloxam and Mitchell, were all transferred to the plaintiffs, and the title-deeds delivered to them. These mortgages and the transfers of them were taken without any notice of the incumbrances of 1848. The plaintiffs took the transfers without any communication with Attwood or the inspectors. The inspectors, in 1854, endeavoured to sell the Hylands estate, but being unable to do so gave up possession, and in July, 1854, the plaintiffs entered into possession as mortgagees. After this, a long series of communications took place between the solicitors of the plaintiffs and a Mr. Elmslie, the solicitor of the inspectors, with reference to the estate, throughout which the title of the plaintiffs as first mortgagees was recognized. Mr. Elmslie, as was afterwards shown in this suit, had from June, 1853, been the solicitor of Frances and Maria Attwood, and held on their behalf the mortgage of the 30th of January, 1848, but \* he \* 31 never alluded to it till January, 1855, when he mentioned it to the solicitors of the plaintiffs in a way which led them to pay no attention to it. In April, 1855, Mrs. Troward and her husband filed a bill to enforce it. The plaintiffs thereupon filed a bill against Attwood and the incumbrancers on the estate, seeking to establish their securities for 25,000*l.*, and the mortgage of the 16th of December, 1851, to Barnard and Barker, as having priority over the mortgage to the Misses Attwood.

Attwood was abroad, and the bill was taken *pro confesso* against him. Gem having died before the institution of the suit, the above deposition by Miss Attwood and the admission by Gem were the only evidence as to what took place when the mortgage was made.

The Master of the Rolls made a decree declaring the securities of the plaintiffs to have priority over the mortgage of the 30th of January, 1848, on the ground that the true construction of the transaction of January, 1848, was, that the deeds had been left with Attwood for the purpose of enabling him to raise money, and that although the intention might be that he should only raise the 15,600*l.* due to the trustees, the Misses Attwood having intentionally, and with a view to his raising money, put it into his power to represent himself as unimcumbered owner of the estate, must take subject to whatever mortgages he was thus enabled to create.

The Misses Attwood appealed from so much of the decree as postponed their security to those of the plaintiffs.

*Mr. Fooks* and *Mr. Druce*, for the appellants.—Attwood \* 32 was under an obligation to give a mortgage \* to the trustees for the 15,600*l.*, and throughout the proceedings of 1848 he intended to give a legal mortgage, having already given an equitable charge. *Wellesley v. Wellesley.* (a) The deeds were therefore properly left with him, that he might give such mortgage; it would have been a breach of duty in him to part with them, and therefore there was no negligence in the appellants not getting them. When the mortgage of the 16th of December, 1851, was made to the plaintiffs, they had notice that Mary Attwood had a charge of 5000*l.* This was enough to put them on inquiry; had they inquired, they would have discovered that the trustees had a security, that the title-deeds were in wrong custody, and that the possession of them was no evidence of unincumbered ownership. Having abstained from inquiry, the plaintiffs must be fixed with the facts of which the inquiry might have given them knowledge, and therefore of our mortgage. *Jones v. Smith,* (b) Sug. V. & P. 1052, 11th edit. We cannot dispute that the original mortgagees, prior to December, 1851, took their mortgages *bond fide* and without notice; but the plaintiffs, having taken transfers with notice, are not in so good a position.

[THE LORD CHANCELLOR.—As to the transferred mortgages, the plaintiffs clearly have the same equity as the transferors.]

At all events, we must prevail against the 6000*l.* mortgage on the ground of constructive notice. Then as to the main point: we have the legal estate, and are not to be postponed unless proved guilty of gross negligence: 1 Fonbl. 164, *Colyer v. Finch*; (c) mere want of extreme caution is not enough. *Jones v. Smith.* (d) Now negligence is not so readily to be imputed to us as if we had been advancing money at the time: in that case we could \* 33 have made our own terms; as it was, we \* were obliged to be content with what we could get. If we had asked for the deeds we should have been told, that they could not be delivered up; and they could not, for Attwood was under obligation to give them to the trustees; negligence in our not getting them is there-

(a) 4 M. & C. 561.

(b) 1 Hare, 55; 1 Phill. 244.

(c) 5 H. L. Cas. 905.

(d) 1 Phill. 244.

fore out of the question. *Farrow v. Rees.* (a) The mortgage was for a term, and so gave no right to the custody of the deeds: *Wise-man v. Westland*; (b) and it was not negligence to omit to take a security which would have done so. *Harper v. Faulder.* (c) The Master of the Rolls says in his judgment that we ought to have indorsed notice on the title-deeds, but it has never been held that it was incumbent on a mortgagee to do this, and *Martinez v. Cooper* (d) and *Harper v. Faulder* (c) are inconsistent with such a view. Even a reasonable excuse for parting with title-deeds, or for not getting them, is enough. *Plumb v. Fluitt*, (e) *Barnett v. Weston*, (g) *Ex parte Reid, Re Buckland*, (h) *Stevens v. Stevens*, (i) *Allen v. Knight*. (k) Making no inquiry as to deeds is negligence; but where it is shown that inquiry would have led to no result, the not making it cannot have any effect. Here the plaintiffs have no title to priority except the possession of the title-deeds, but they only got them through Beisly's wrongful act, and they cannot obtain any advantage from his breach of duty any more than if they got them from a person who stole them.

*Mr. R. Palmer, Mr. Giffard, and Mr. H. Cadman Jones*, for the plaintiffs and the defendants Barnard and Barker.—

\* It is perfectly plain, that at the time when the mortgage of \* 34 30th January, 1848, was given, no negotiation for a mortgage to the trustees was going on. Attwood had not given a charge; he had only bound himself to give a mortgage if required. The trustees not only did not require it, but most positively refused it, and were vigorously prosecuting actions to recover the money. After this they could not have set up any claim against persons claiming for value under Attwood. It is argued, that Attwood could not lawfully part with the title-deeds, but must keep them for the trustees; if so, he was still more bound to keep the legal estate for them. Had this been a *bond fide* mortgage it would not have been kept from the knowledge of the trustees, but notice of it would have been given and the concurrence of the

- (a) 4 Beav. 18.
- (b) 1 Y. & J. 117.
- (c) 4 Madd. 129.
- (d) 2 Russ. 198.
- (e) 2 Anstr. 432.

- (g) 12 Ves. 130.
- (h) 17 L. J. Bank. 10.
- (i) 2 Coll. 20.
- (k) 5 Hare, 272, affirmed 11 Jur. 527.

Misses Attwood offered. Either the mortgage was meant as a fraudulent pocket security, or it was the intention of the parties that it should not affect the dealings of Attwood with his estate. The conduct of the Misses Attwood's solicitor in 1853 and 1854 leads to the latter view. The intention of the Misses Attwood, no doubt, was, that Attwood should use the deeds only for the purpose of raising money to satisfy the trustees; but as they put it into his power to raise money, without any check as to the amount, they must be bound, whatever amount he raised.

Suppose the Misses Attwood had been actively negotiating for a security, there can be no doubt that they must have been postponed for negligence, according to the rule laid down in *Hewitt v. Loosemore*, (a) and *Colyer v. Finch*. (b) *Worthington v. Morgan* (c) supports our case, and is approved in *Finch v. Shaw*. (d)

\* 35 [THE LORD \* CHANCELLOR.—That was a case as to notice of a prior equitable incumbrance, and does not seem to stand on exactly the same footing as this.]

The principle, we submit, is the same in each case; the question is, whether there has been gross negligence. In *Harper v. Faulder* and *Farrow v. Rees* it would not have been proper for the mortgagors to part with the deeds, therefore the mortgagees could not be guilty of default in not getting them. As to *Martinez v. Cooper*, which has been much relied on, that was a case of a temporary loan of the deeds, for which a reasonable excuse was given; a lengthened parting with them stands on a different footing: *Waldron v. Sloper*; (e) and in the present case there was a complete abandonment of all right to them. *Rice v. Rice* (g) supports our case, though, being only between equitable claimants, it is not conclusive.

The Misses Attwood did not, however, in fact, negotiate for a security. They were living with their brother, who appears to have been generous to them. They had confidence in him, and never thought of asking for security. He volunteered to give them one. They do not say that they asked for the deeds at the

- (a) 9 Hare, 549.
- (b) 5 H. L. Cas. 905.
- (c) 16 Sim. 547.

- (d) 19 Beav. 500, 511.
- (e) 1 Drew. 193.
- (g) 2 Drew. 73.

time, and were told that they could not have them because they were wanted to give a security to the trustees; they merely allege it now as a reason why they could not have had the deeds if they had asked for them. But it is clear, from the facts proved, that the deeds were not in the possession of any person on behalf of the trustees at that time, and that they were retained that Attwood might be enabled to raise money to pay off the trustees without disclosing the mortgage of January, 1848. Under these circumstances, the Misses Attwood, taking \* only through a \* 36 voluntary act of Attwood, cannot prevail against purchasers for value from him.

No case as to notice is set up against us except so far as regards our 6000*l.* charge. Even as to that there is no pretence for such an argument. Inquiry as to Mary Attwood's 5000*l.* might have led us to knowledge of the security of the trustees, but there is nothing to show that it could have led to knowledge of the mortgage to the Misses Attwood. There is, therefore, no constructive notice. *Barnhart v. Greenshields.* (a)

The mortgage to the Misses Attwood is void as against us under the 27 Eliz. c. 4. It was a secret conveyance made under such circumstances that it must be deemed to have been made to defraud subsequent purchasers.

*Mr. Selwyn, and Mr. Osborne Morgan, for Bloxam and Mitchell and the other parties interested in the 40,000*l.* mortgage.*

*Mr. Amphlett, for the trustees of Hawkins's will and J. A. Attwood's settlement.*

*Mr. Hingeston, for Maria Louisa Attwood and Mary Attwood.*

*Mr. Fooks, in reply.*

THE LORD CHANCELLOR.—This case has occupied a long time in argument, and has given rise to the agitation of questions of great importance. It has been discussed how far a mortgagee, \* taking a mortgage without taking the title-deeds, \* 37 does or does not postpone himself to persons who take a sub-

sequent conveyance for value without notice of the mortgage, and obtain possession of the title-deeds, and the cases on that subject have been referred to, the last being *Colyer v. Finch*, in the House of Lords.

I should think it very inexpedient now to treat it as a question open to discussion whether the law has or has not been correctly laid down on this subject, for I consider it to have been established beyond doubt that the law is, that the person having the legal estate without the title-deeds is not to be postponed to a subsequent incumbrancer having the title-deeds, unless he has been guilty of something which the law calls fraud or gross negligence. I agree that this rule may very often lead to great hardship on persons who have taken conveyances relying on the possession of the title-deeds as evidence of unencumbered ownership in the conveying party. Such, however, is the law, and I must act upon it until it is otherwise settled. Still, if the present case had involved that principle, I should have taken time to consider my judgment, for it is difficult in each particular case to say what amounts to negligence, and still more is it difficult to say what constitutes negligence with the epithet of gross connected with it.

In my opinion no such question arises in the present case. I do not think there was here any fraud or any negligence, for I do not believe that any of the parties to the transaction of January, 1848, intended that the mortgage then taken should interfere with any subsequent dealings for value which Attwood might have with his estate. If the parties did so intend, the transaction was a gross fraud on the part of Attwood and his solicitor, and of the ladies also, if they understood it.

\* 38 \* The case is this: Mr. Attwood was a single man advanced in life, and living with two of his sisters, who were not young. He managed all their affairs. He was indebted to each of his three sisters, the two who lived with him and another who was married, in the sum of 10,000*l.* each. At the end of 1847 and the beginning of 1848, he was pressed by creditors who were insisting on payment of large sums of money, amounting altogether to above 15,000*l.* He proposed to give them a mortgage, they refused it, and insisted on having payment of the money. That took place in the early part of January, 1848. I do not go into the details of the evidence, but there were angry discussions going on and actions brought; and pending these

proceedings, after issue of the writs and the delivery of pleas in the actions, Mr. Attwood executed the deed in question, for giving a security to his three sisters for the 30,000*l.* that he owed to them, but intentionally did not give them the title-deeds, as we learn from the evidence of Mr. Spencer. [His Lordship here read the passage from Mr. Spencer's affidavit, which is given above.] What does that prove the purport of the transaction to have been? That this security was given either with the intention (to put the worse construction on the conduct of the parties) that the ladies should have a pocket security of which they could avail themselves afterwards, when those who were to claim under subsequent conveyances by Mr. Attwood should assert their rights, or (to adopt a more favourable, and I hope and believe the true construction) that the deed was never intended to be set up against any subsequent dealing with the property by Mr. Attwood by way of mortgage, the title-deeds being returned to him to be dealt with as he thought fit. I think it is clear, even from *Mr. Fooks's* own argument, that at this time it was contemplated by all parties that Mr. Attwood should raise money to pay off the creditors by whom he \*was then being sued. Taking that to be the \* 39 intention, I agree with the view of the Master of the Rolls, in every part of whose judgment in this cause I entirely concur, that if a person taking a legal mortgage chooses to leave the deeds with the mortgagor, not through negligence or through fraud, but with the intention of enabling him to raise a sum of 15,000*l.*, which is to take precedence of the legal mortgagee, the mortgagee cannot, as against subsequent mortgagees, complain if, instead of 15,000*l.*, the mortgagor raises 50,000*l.*, because he has himself put it into his power to raise any sum of money he pleases. That is the true nature of this transaction. It is not a case in which there was any negligence. It is not a case, as I am willing to believe, in which there was any fraud; but it is a case in which the mortgagees did deliberately and intentionally leave the deeds in the hands of the mortgagor, in order that he might raise money. To hold that a person who advances money on an estate, the title-deeds of which are under such circumstances left in the hands of the mortgagor, is not to have preference, would be to shut our eyes to the plainest equity.

I much incline to the view, though I am not wholly free from doubt upon the point, that this mortgage is void as against the

plaintiffs by virtue of 27 Eliz. c. 4. It has been urged against this view that it was not a voluntary conveyance; but, though we are most familiar with the application of the Act to voluntary conveyances, it is not necessary that a conveyance should be voluntary to come within it.<sup>1</sup> There is not a word in the statute about a conveyance being voluntary; the statute speaks only of conveyances made for the purpose of deceiving persons who shall purchase the

property, and of conveyances by the secret intent of the con-  
\* 40 veying parties to be \*to their own proper use.<sup>2</sup> If the intention of the parties to the transaction here in question was that the Misses Attwood should have this security, but that nevertheless Mr. Attwood should keep the title-deeds, that he might be enabled thereby to deal with the estate in favour of third parties, I am strongly disposed to think that the security comes within the statute: it certainly comes within its principle. If the case does come within the statute, the only difference that it makes is that the Misses Attwood have not the legal estate, and so could not maintain ejectment against the plaintiffs, but that would not in any degree oust the jurisdiction of this Court, such jurisdiction having existed long prior to the statute, and not being in any degree defeated by an Act which can only have been intended to give a more clear and distinct jurisdiction and a more extended remedy.

It appears to me, therefore, that this appeal ought not to have been brought, and that it must be dismissed with costs.

<sup>1</sup> See 4 Kent (11th ed.), 462, 463; *Edgell v. Lowell*, 4 Vt. 405; *Trotter v. Watson*, 6 Humph. 509; *Wadsworth v. Williams*, 100 Mass. 126; *Beal v. Warren*, 2 Gray, 447.

<sup>2</sup> In *Beal v. Warren*, 2 Gray, 452, 453, THOMAS J. said: "It is to be observed that the Stat. of 27 Eliz. c. 4, has said nothing in relation to voluntary conveyances. It seeks to frustrate and render void conveyances, not because they are voluntary, but because made with the intent and purpose to deceive and defraud such persons as shall purchase the land for money or other good consideration. They are void not because they are voluntary, but because they are fraudulent." For a full discussion of the effect of this statute upon voluntary conveyances as against subsequent purchasers for valuable consideration, see *Beal v. Warren*, 2 Gray, 447; 1 Story Eq. Jur. § 425 *et seq.*; 4 Kent (11th ed.), 462, 463; *Sexton v. Wheaton*, 8 Wheat. 229; *Salmon v. Bennett*, 1 Conn. 525, and notes to the last two cases in 1 Am. Lead. Cas. (4th ed.) 17 *et seq.*; 2 Sugden V. & P. (8th Am. ed.) 712 *et seq.* and notes.

## \* DAWSON v. PRINCE.

\* 41

1857. November 24, 25. December 17. Before the LORDS JUSTICES.

A bill of exchange, payable to the order of C. D., a married woman, was remitted to her in respect of her separate estate. Her husband got possession of it without her knowledge, forged her name on the back, then indorsed his own name, and gave the bill to P. to get it discounted, stating that she had indorsed it. P. got it discounted, and in order to do so was obliged himself to indorse it. He then paid the proceeds to the husband. The acceptor, in consequence of a notice from C. D., refused to pay the holder, who thereupon had recourse to P. P. paid the holder. A suit having been instituted by C. D. to establish her title to the bill and to restrain P. from suing the acceptor at law:

*Held*, that P. was to be treated as a purchaser of the bill for value.

*Held*, also, that assuming P. to have notice that the bill was drawn in respect of C. D.'s separate estate, yet as there was nothing to excite suspicion of the forgery, he was justified in relying on the husband's statement that the bill had been indorsed by her, and was not bound to inquire further as to the genuineness of her signature, and that there was therefore no equity to restrain him from the assertion of the legal title which he acquired by the husband's indorsement.

Whether the circumstance that a bill is made payable to the order of a married woman is notice that it relates to her separate estate, *quære*.

THIS was an appeal by the defendant, Daniel Prince, from a decree of the Master of the Rolls restraining him from suing on a bill of exchange, on the ground that it was part of the separate estate of the plaintiff Charlotte Dawson, a married woman, that it had been negotiated without her consent, and that the defendant took it with notice.

The plaintiff and her husband, the defendant Joseph Dawson, were married in Australia in July, 1854, on which occasion a settlement was made of part of her property, by which the income was secured to her separate use. The husband and wife shortly afterwards came to England.

In May, 1856, one of the trustees of the settlement sent from Australia to Mrs. Dawson a bill of exchange for 196*l.*, drawn on the Bank of Australasia in London, and made payable "to the order of Mrs. Charlotte Dawson," thirty days after sight. This bill was a remittance \*on account of the income of the settled fund, and was sent in a letter addressed to Mrs. Daw-

son, to the care of the defendant Prince, which arrived in August, 1856. Mr. Dawson received the letter, left the bill at the Bank of Australasia for acceptance, and on 20th August brought it, accepted by the bank, to Prince at his office, and asked him to get it discounted. Prince observed that it was payable to Mrs. Dawson. Dawson replied that it was, and that she had indorsed it. The bill in fact bore indorsed upon it a signature purporting to be Mrs. Dawson's. Prince thereupon said: "Put your name upon it, and I will get you the money." He knew that the payee was the wife of Mr. Dawson, but did not know her handwriting; he did not ask whether her signature was genuine, but upon Dawson's indorsing the bill took it to the bankers of Messrs. Overend & Gurney, and had it discounted. The bankers, upon taking the bill, required Prince to indorse it, which he accordingly did, and having received the money, handed it to Dawson, who retained it for his own purposes, and shortly afterwards deserted the plaintiff.

The bill at the time when it was discounted had twenty-six days to run, and Mrs. Dawson, before it became payable, served a notice on the bank, stating that her signature was forged. The bank thereupon refused to pay till the rights of the parties were determined. Overend & Gurney therefore had recourse to Prince, and he paid them. Mrs. Dawson then filed a bill against Prince, Dawson, and the bank, alleging that she had never indorsed the bill, and that her husband had disposed of it without her authority, consent, or knowledge, and praying that she might be declared entitled to it, that the bank might be ordered to pay her, and that

Prince might be restrained from suing at law on the bill.

\* 43 \* When the cause came on for hearing before the Master of the Rolls, the evidence of Mrs. Dawson, verifying the allegations of the bill, was uncontradicted. Mr. Prince, on his cross-examination, deposed as follows as to what passed when he took the bill from Dawson: "Her name was then upon it. I never had seen her at that time, and I did not know her handwriting. I made no inquiries whether it was her handwriting or not, for I never doubted it, as her husband brought the bill and she had indorsed it. If I had known that her indorsement was not her handwriting, I should not have procured the bill to be discounted, nor should I have done so if her name had not been on it. It would not have been regular."

The Master of the Rolls held that the fact of the bill being payable to the order of a married woman was notice of her title, and that Prince must therefore be held affected by notice that it was her separate estate. His Honor further held that a forged signature could not give Prince any rights against Mrs. Dawson, and he granted a perpetual injunction against any proceedings being taken at law on the bill.

Mr. Prince appealed; and it having been seen on the production of the bill at the hearing that Mrs. Dawson's signature upon it was extremely like other signatures of hers which were indisputably genuine, he adduced the evidence of two persons skilled in making fac-similes of handwriting, who deposed with confidence, from the comparison of this signature with other undisputed signatures, that it was genuine. This evidence was read *de bene esse* on the hearing of the appeal,<sup>1</sup> and Mrs. Dawson, with her own consent, was examined *vivid voce* in Court.

*Mr. Speed* and *Mr. Villiers*, for the plaintiff. — We submit that the Master of the Rolls was right in holding that the form of the bill was notice that it related to the separate estate of Mrs. Dawson. No doubt a bill might be made in this form without relating to separate estate, but it is highly improbable that it would be; and the reasonable presumption is that a bill thus drawn is separate property. No doubt the husband's indorsement passed the legal interest, but the equitable title could be acquired only by an assignment from Mrs. Dawson, and a forged indorsement from her is a mere nullity. Prince cannot be treated as a purchaser for value: he was rather an agent to get the bill discounted.

*Mr. Follett* and *Mr. C. T. Simpson*, for Prince. — Prince must be looked upon as a purchaser for value. He made himself liable to Overend & Gurney on the bill, and, having paid them, he at all events takes their rights. The cases in which it has been held that the husband's indorsement passes the legal title to a bill of this nature show that the view of the Master of the Rolls as to the form of the bill being notice of separate use is not according to the common understanding of mankind with respect to commer-

<sup>1</sup> See 2 Dan. Ch. Pr. (4th Am. ed.) 1487.

cial instruments. *Mason v. Morgan*, (a) *Barlow v. Bishop*. (b) Bills are often drawn in favour of married women without relation to separate estate. That a bill is so drawn may afford room for conjecture that it is separate estate, but does not, as we submit, give constructive notice that it is. See the principles as to constructive notice in *Jones v. Smith*, (c) *West v. Reid*. (d) The doctrine of constructive notice is not to be extended. *Ware v. Lord Egremont*. (e)

But suppose Prince had notice that the bill was separate \* 45 \* estate, we submit that he did all that it was incumbent on him to do, and that there is no equity to affect his legal rights. There was nothing in the circumstances of the case to excite suspicion, and he took the bill *bond fide*, in the belief, and relying on the husband's representation that she had indorsed it. Under these circumstances he was not bound to inquire further. *Jones v. Smith*, (g) *Hewitt v. Loosemore*. (h) In *Jones v. Powles*, (i) the equitable title was deduced through a forged instrument, but the purchaser, there being nothing to lead him to suspicion of the forgery, was held entitled to protect himself by a legal estate which he had got in. That case governs the present, and is approved by Lord ST. LEONARDS in *Bowen v. Evans*. (k)

*Mr. Cotton*, for the Bank of Australasia.

*Mr. Speed*, in reply.—No title can be acquired under a forged indorsement. *Esdaille v. La Nauze*. (l) Every one who takes a negotiable instrument knows that he must look to the genuineness of the indorsement, and it could easily have been ascertained whether this was genuine. In the cases cited on the other side, all that could reasonably be required was done, not so here.

Judgment reserved.

December 17.

THE LORD JUSTICE KNIGHT BRUCE.—In this cause the plaintiff, Mrs. Dawson, a married lady suing by a next friend, claims for

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| (a) 2 Ad. & Ell. 30.           | (g) 1 Phill. 244.          |
| (b) 1 East, 432.               | (h) 9 Hare, 449.           |
| (c) 1 Hare, 43; 1 Phill. 244.  | (i) 3 M. & K. 581.         |
| (d) 2 Hare, 249, 257.          | (k) 1 Jo. & Lat. 178, 264. |
| (e) 4 De G., M. & G. 460, 473. | (l) 1 Y. & C. Exch. 394.   |

her separate use the possession and benefit of a bill of exchange for 196*l.*, \* which is in the hands of the defendant \* 46 Mr. Prince as indorsee and legal holder. It is overdue, the acceptors, however, being ready to pay the amount to the holder, unless prevented by the interposition of the Court in favour of the plaintiff, whose title, if any, is of course equitable merely, that of the holder the defendant Mr. Prince being, as I have said, good at law. There is no dispute except between him and the plaintiff, who is the payee of the bill, on the back of which her name "Charlotte Dawson" is written as the signature of an indorser, a signature said by her to be forged. With this signature (whether forged or not forged) upon it, and the signature upon it also (a signature certainly genuine) of her husband as an indorser, it came into the possession of Mr. Prince as an indorsee for value before its maturity, and he insists that he is entitled to recover at law on the instrument against the acceptors for his own benefit.

The Master of the Rolls, on the materials before him, came, as I understand, to the conclusion that the alleged indorsement by the plaintiff of the bill of exchange was not genuine, and was written without her authority, consent, or knowledge; that, as between herself and her husband at least, he had no right to deal with the instrument, and that she had a good title to the benefit of it for her separate use, a title available against the present holder.

Before us evidence in addition to that which existed in the suit at the time of the Rolls hearing was tendered, for the purpose of proving the genuineness of the disputed signature, and *de bene esse* but not otherwise received. I doubted and still doubt whether it could or can, in the circumstances of the case, be right to admit it absolutely. That point, however, I think unimportant \* upon the question whether we ought to grant or \* 47 refuse relief to the plaintiff, who was examined *vivâ voce* before us, with her consent, upon the request of the counsel of the defendant Mr. Prince, and they are both entitled to have that examination considered as part of the testimony in the suit. Whether upon all the materials before us (considered either as including or as not including the evidence received *de bene esse*), it is or would be a correct conclusion to hold that the plaintiff neither indorsed the bill nor gave permission to her husband to deal with it as he did, I am not sure. But, as the case appears to me, we can do no injustice by assuming, for the purpose of the

question whether the plaintiff is entitled to relief against Mr. Prince in the present suit, and accordingly, for that purpose, I assume that the bill of exchange was remitted to this country as part, and did form part, of the plaintiff's separate property, and was not indorsed by her; that Mr. Joseph Dawson, her husband, dealt with it without her consent, and that as against her he had no equitable right, no equitable power, to deal with it. But can her equitable claim, though valid against him, prevail against the present legal title to the bill and to the benefit of it, — a legal title which, having under his indorsement been unquestionably acquired by the defendant Mr. Prince, is now clearly vested in that gentleman, vested in him for valuable consideration. I say for valuable consideration, inasmuch as before the maturity of the bill he indorsed it, in the character, as between himself and Mr. Joseph Dawson, of surety for Joseph Dawson, and became, as indorser, liable to pay the amount of the bill, at or after its maturity, to Messrs. Overend, Gurney, & Co., who before its maturity discounted it, and at or after its maturity received the amount of it from Mr. Prince, who on the occasion of the discounting, and therefore before the maturity, had handed to Joseph Dawson

\* 48 the sum \* paid by the discounters; and it appears to me that,

however good and effectual the alleged equitable title of the plaintiff would have been if Mr. Prince had not indorsed and paid as he did indorse and pay, it must, in the actual circumstances, give way to his legal title, inasmuch as, in my opinion, neither before nor when he indorsed the bill, nor before nor when he paid to Joseph Dawson the money received from Messrs. Overend, Gurney, & Co., had Mr. Prince knowledge, information, or notice of any facts or fact of such a nature as to render it incumbent on him, as between himself and the plaintiff, to apply to her or make more inquiry or investigation than he did make. Whether the circumstance that the plaintiff was the payee of the bill, coupled with the fact that when and before Mr. Prince had any thing to do with it, he was aware, according to the truth, that the plaintiff was the wife of Joseph Dawson, and had been so at and before the time of the drawing of the bill, amounted or did not amount to notice, actual or constructive, to Mr. Prince, that the bill was drawn on account of separate estate of hers, or was her separate property, or represented any money or property belonging to her for her separate use, I think it unnecessary to give, and I do not give, any

opinion. Certainly, however, I am not satisfied that Mr. Prince, before or when he parted with the money paid by him to Joseph Dawson, knew in fact, believed in fact, or suspected in fact, that the plaintiff had any interest in the bill for her separate use. Mr. Prince certainly thought that in point of regularity, if not of necessity, the bill required indorsement by the payee, though a married woman, but he was told by her husband that she had indorsed it, and her signature (whether forged or not forged) was, I repeat, on the back of the bill as that of an indorser. I think that Mr. Prince believed in the genuineness of that signature and acted on that belief, nor can I consider him censurable \* for having \* 49 entertained it. The signature had not, I conceive, a suspicious appearance to any person not familiar, if to any person familiar, with her ordinary mode of writing her name, and I conceive that a reasonable man acting fairly might well have believed that the husband held and was dealing with the bill not without the knowledge of his wife, not without her consent, not wrongfully. It appears to me that for every purpose of the present claim and dispute Mr. Prince must be taken to have been entitled to rely on what Joseph Dawson said, and to consider him not without the equitable, as plainly he was not without the legal, right to dispose of the bill. That Mr. Prince meant to act honestly I am satisfied, and although probably, if the payee of the bill had not been Joseph Dawson's wife, Mr. Prince would, on the hypothesis of the signature "Charlotte Dawson" upon the bill of exchange being a forgery, have lost his money, I repeat that in my judgment, as the facts are, he must in the position of a defendant here prevail, and it seems to me accordingly that he ought to be dismissed from the suit. With regard to the costs of it, considering as I do that Mr. Prince was blameless in the transaction which produced the litigation, I think that the plaintiff's next friend must pay the costs<sup>1</sup> from the beginning, except Mr. Prince's costs of the appeal, those Mr. Prince must, I conceive, bear himself.

THE LORD JUSTICE TURNER.—This case is peculiar in its circumstances, but it seems to me to be governed by principles and authorities to which we are bound to give effect. Both upon principle and upon authority I take it to be perfectly settled, that as

<sup>1</sup> See Lindsay v. Tyrrell, *ante*, 9 note (1).

against a purchaser for valuable consideration without notice, having a legal title, this Court will give no relief. It is not \* 50 attempted to be denied that the defendant \* Prince has in this case a good legal title, and what we have to consider, therefore, is, whether he is a purchaser for valuable consideration, and whether he can be affected with notice.

First, then, as to the question of notice. It has been said, that the mere fact of a bill being made payable to a married woman is notice to all the world that the moneys payable upon the bill belong to the married woman for her separate use. For the purposes of this case I assume this to be so, not intending however to intimate any opinion, much less to decide, that it ought to be so considered. I think that question immaterial to the present case, for this bill when it came to the hands of the defendant Prince purported to bear the indorsement of the plaintiff, and it is in evidence, that before the defendant Prince proceeded to get the bill discounted he was told by the husband of the plaintiff that it had been indorsed by her. In my opinion he was entitled to rely upon that representation and was not bound to make further inquiry. I think so upon the authority of *Jones v. Smith* and *Ware v. Lord Egmont*, which were referred to in the argument before us. It was said, indeed, that those cases were cases relating to real estate and were not applicable to the case before us; but those cases rest upon a broad principle which does not depend upon the nature of the property in respect of which the question arises;<sup>1</sup> and, besides, I think that it would be at least as dangerous to extend the doctrine of constructive notice in cases relating to commercial transactions as in cases relating to real estate. It was said, however, that the transaction in this case was not an ordinary commercial transaction, that it was a transaction out of the ordinary course of business; but it cannot be denied that there was here a dealing with an instrument of commerce by a person engaged in commercial transactions, and it \* cannot I think be said, that a merchant or tradesman procuring a bill to be discounted for a person in the habit of resorting to the house of business in which he is engaged, as the husband of this lady appears to have been, is acting otherwise than in the ordinary course of business, at all events to such an extent as to induce any

<sup>1</sup> See Sugden V. & P. (14th Eng. ed.) 788.

suspicion. I am of opinion, therefore, that the defendant Prince cannot in this case be affected with notice that this bill was not indorsed by the plaintiff, if in truth it was not so indorsed, on which I give no opinion.

It remains then only to consider whether the defendant Prince is to be deemed to be a purchaser for valuable consideration, and I am of opinion that he ought to be so considered. If this bill had been discounted by him there could have been no question upon the point, and I think it can make no difference that he did not himself discount it, for it was by his indorsement that it was procured to be discounted, and by virtue of that indorsement he has been compelled to pay it. It was said for the plaintiff, that he was a mere agent in the transaction, but this is not so; so far as he was an agent at all, he was an agent who came under liability on account of his principal.

Upon the whole, therefore, my opinion is that this bill ought to have been dismissed, and I think that it should have been dismissed with costs; but as the plaintiff has had the authority of the Master of the Rolls in her favour, I think there should be no costs of the appeal, except as to the bank, whose costs must be paid by the plaintiff.

## \* CADDICK v. SKIDMORE.

## \* 52

1857. November 5, 7. December 2. Before the Lord Chancellor Lord CRANWORTH.

An agreement between A., a lessee of a mine, and B., to become partners in the mine, paying the reserved rent, subletting the mine at a royalty, and dividing the profits: *Held*, to be within the Statute of Frauds, and not sufficiently proved by a receipt signed by A. and given to B. for a sum as B.'s share of the head rent of the mine, the sum being exactly half of that rent.<sup>1</sup>

<sup>1</sup> A receipt for the purchase-money may constitute an agreement in writing within the statute. *Coles v. Trecottick*, 9 Ves. (Sumner's ed.) 234, note (c); *1 Sugden V. & P.* (8th Am. ed.) 130, note (p); *Hurley v. Brown*, 98 Mass. 546; *Evans v. Prothero*, 2 Mac. & G. 319; *S. C.*, 1 De G., M. & G. 572; *Cosack v. Descondres*, 1 McCord, 425. But to have this effect the receipt must show, either on its face, or by reference to some other document, every material

THIS was an appeal from the decision of Vice-Chancellor KIN-DERSLEY, dismissing a bill for an account of the profits of an alleged mining partnership, one of the defences being, that there was no sufficient agreement within the Statute of Frauds.

The case stated by the bill was in substance as follows. That Mr. Skidmore, the defendant, had, under an indenture of the 29th of August, 1846, become entitled for a term of twenty years to certain beds of coal, iron-stone and iron-ore situate at Tividale, in the parish of Rowley Regis, in Staffordshire, subject to the payment, during the first seven years of the term, of the yearly sum of 500*l.* That at the time of the defendant taking this lease he had been working in partnership with a Mr. Wagstaff an adjoining colliery called the Sutherland colliery. That shortly after the execution of the lease of the Tividale colliery the defendant called on the plaintiff and showed him the lease and invited him to become a partner with him in the working colliery, except three acres, being the upper part thereof, telling the plaintiff that he and Mr. Wagstaff had taken these three acres and had paid 2000*l.* as the consideration for them, and asking the plaintiff to become a partner with him in working the residue. That the plaintiff and defendant thereupon agreed to become, and did in fact become, partners upon the terms, that the Tividale colliery, exclusive of the three acres, was to be managed and carried on by the defendant in his own name; that the plaintiff was to be a dormant partner therein, and that the plaintiff and the defendant were to be equally interested in the profits of the concern. That in the

\* 53 \* spring of the year 1847 the plaintiff and defendant commenced preparations for opening the Tividale colliery, and for that purpose purchased some old machinery. That on the 13th of July, 1847, the plaintiff paid the defendant 300*l.*, whereof

part of a valid contract. *Barickman v. Kuykendall*, 6 Blackf. 21; *Kay v. Curd*, 6 B. Monroe, 100; *Ellis v. Deadman*, 4 Bibb, 466; *Welsh v. Bayaud*, 6 C. E. Green, 186. As to the effect of the Statute of Frauds upon partnerships having landed property, see 1 Lindley Partn. (Eng. ed. 1860) 82, and the remarks of the learned author upon the decision in *Caddick v. Skidmore*, on pp. 83, 84; *Dale v. Hamilton*, 5 Hare, 369; *Collyer Partn.* (5th Am. ed.) § 3, and notes; *Smith v. Burnham*, 3 Sumner, 435, 458, 471; *Story Partn.* § 83; *Bunnel v. Taintor*, 4 Conn. 568; *Fall River Whaling Co. v. Borden*, 10 Cush. 458; *Pitts v. Waugh*, 4 Mass. 426; *Gray v. Palmer*, 9 Cal. 616; *Black v. Black*, 15 Geo. 445; *Patterson v. Grace*, 10 Ala. 444; *SERGEANT J.*, in *Hale v. Henrie*, 2 Watts, 145, 147; *TUCKER J.*, in *Wheatley v. Calhoun*, 12 Leigh, 264.

250*l.* was contributed towards payment of the first instalment which was due under the lease, and the remaining 50*l.* towards the expenses incurred in preparation for working the colliery. That from the time of entering into the partnership the defendant had the sole control over the colliery, and that all payments on account thereof were made through him. That in 1847 the defendant let the mine for fourteen years at a royalty, and paid the plaintiff various sums specified in the bill on account of his share of the profits, and that the plaintiff paid from time to time various sums, to enable the defendant to pay the head rent. That in the month of January, 1852, the defendant induced the plaintiff, by fraud and misrepresentation, to give up his interest in the colliery. The prayer was for a declaration that the plaintiff was a partner with the defendant in the Tividale colliery until a sale thereof, which the defendant had made in December, 1853, and for an account of the dealings and transactions of the defendant in respect of the colliery, and that the defendant might pay what was due to the plaintiff upon accounts.

The defendant, by his answer, denied the existence of any such agreement as was alleged by the bill, and claimed the benefit of the Statute of Frauds.

The only written documents relied upon as evidence of the agreement were three receipts, which were as follows:—

“ Received of Mr. Elisha Caddick the sum of 300*l.* on account of his share in the Tividale mine.”

\* “ Received of Mr. Elisha Caddick the further sum of \* 54 300*l.* on account of his share in the Tividale mine.”

“ Handsworth, 31st October, 1849.—Received from Mr. Caddick 250*l.*, his share of dividend in mine instalment due to Messrs. Bannister for the Tividale mine.”

Parol evidence was gone into in support of the alleged agreement and of the alleged fraud. On this evidence the Vice-Chancellor came to the conclusion, that the agreement which appeared on the evidence to have been entered into was not for a general partnership, but for paying the reserved royalty, subletting the mine at a royalty, and dividing the profit, and consequently did

not establish the case alleged by the bill, which his Honor on that ground dismissed.

*Mr. Glasse* and *Mr. C. Hall*, in support of the appeal.

*The Attorney-General*, *Mr. Freeling*, and *Mr. Pearson*, for the respondent.

The following cases were referred to : *Forster v. Hale*, (a) *Blagden v. Bradbear*, (b) *Clinan v. Cooke*, (c) *Reynolds v. Waring*, (d) *Bligh v. Brent*, (e) *Dale v. Hamilton*, (g) *Curling v. Flight*, (h) *Baxter v. Brown*, (i) *Powell v. Jessopp*, (k) *Watson v. Spratley*. (l)

\* 55 \* The Lord Chancellor (after stating the facts) said : It is unnecessary to determine whether the statement of the agreement in the bill is such as would warrant a decree upon the agreement appearing upon the evidence, because, assuming the bill to have stated such an agreement as appears to me upon the strong balance of evidence to be established, that is to say, an agreement to the effect that the plaintiff and defendant were to become partners in the colliery for the purpose of demising it upon royalties which were to be divided in some proportion between them, it would in my opinion be an agreement not capable of being enforced, unless proved by such evidence as is required by the Statute of Frauds ; for there does not appear to be any thing to take this case out of the operation of the statute. Now there certainly was no agreement signed at the time. The only signatures that have been referred to as satisfying the requirements of the statute are the receipts which were signed on different occasions by the defendant Skidmore when money was paid to him by the plaintiff. [His Lordship read them.]

The last of these receipts is the only one of the documents that creates any doubt as to whether there was a sufficient signature to take the case out of the operation of the Statute of Frauds. The fair inference to be drawn from that document is, that upon some

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| (a) 5 Ves. 314.       | (g) 5 Hare, 369.      |
| (b) 12 Ves. 466.      | (h) 2 Phil. 613.      |
| (c) 1 Sch. & Lef. 22. | (i) 7 Man. & Gr. 198. |
| (d) Younge, 346.      | (k) 18 Com. B. 336.   |
| (e) 2 Y. & C. 268.    | (l) 10 Exch. 222.     |

terms or other the plaintiff had bound himself to contribute towards payment of the instalment mentioned in the receipt. But that is not sufficient to take the case out of the operation of the statute, which requires that an agreement relating to land should be an agreement signed by the party to be charged. And although the Court has struggled to bring within the description of a signed agreement any instrument, \* however informal, which \* 56 does in truth disclose what the terms of the contract were, it has never repealed the Statute of Frauds by holding a writing to be within its meaning which has not that effect; i.e., which does not by plain words or reasonable inference disclose what was the contract of the parties.

Now, although the last receipt may show, and I think does show, that there were certain terms, one part of which was that the plaintiff was to pay a portion of the rent, or perhaps even shows that he was to pay half of the rent, yet it does not show what the other terms were, according to which the alleged partners were to be mutually interested in the result of this payment, and they are distinctly at issue upon that subject. The plaintiff states the intention to have been that the partners were to be jointly interested without more; on the other hand, the defendant insists that although a joint interest may have been agreed upon, yet that before any division the plaintiff was to contribute to some large previous outlay of the defendant, who was also to have a large charge upon the royalties.

The parties therefore are distinctly at issue as to what the contract was, and the very object of the Statute of Frauds was to prevent parol evidence being gone into to elucidate that which the parties have failed to make distinct by reducing it into writing. In my opinion that affords a conclusive answer to the claim of this plaintiff.

The grounds upon which I proceed are, that the agreement was one for the purchase of an interest in land, which was not reduced into writing so that its terms can be ascertained; that there was no part performance; and that the defendant sets up a totally different contract \* from that which is insisted upon by the \* 57 plaintiff, and claims the benefit of the Statute of Frauds.

I am therefore of opinion that the bill ought to be dismissed, and was properly dismissed by the Vice-Chancellor, and consequently, that this appeal must be dismissed with costs.

RANDFIELD *v.* RANDFIELD.<sup>1</sup>

1857. November 25. December 2. Before the Lord Chancellor Lord CRANWORTH.

A testator gave realty and personality to his son when he should have attained twenty-one, subject to an annuity to the testator's widow, and then proceeded thus, — "should the hand of death fall on my widow and son, and my having no children or my son any issue, my will is, that, should he leave a widow, she shall receive the annual sum of 50*l.* during her widowhood out of my real estates, the residue then to be equally divided, after paying such legacies as I may hereafter name, the division of property to be between my late brother's surviving children and my sister I. W.'s children, my sister R. S.'s children and my nieces G. B. and S. S., they paying all my son's just debts, funeral expenses and demands, or my wife's, should she be the longest liver:" *Held*, that the executory gift was not too uncertain to cut down the absolute gift to the son, but that on his death, without having had any issue, such of the children of the testator's specified brothers and sisters as were living at the testator's death, together with his specified nieces, were entitled.<sup>2</sup>

*Semble*, that the condition as to payment of the son's or widow's debts would be inoperative.

THIS was an appeal from the decision of Vice-Chancellor KIN-DERSLEY, reported in the 4th Volume of Mr. Drewry's Reports. (a)

William Randfield by his will gave freehold and copyhold property to his son William Cass Randfield, after the testator's decease, and when he should have attained the age of twenty-one years, upon the following conditions being complied with: that Ann Randfield, his mother, should receive annually the sum of 120*l.* sterling, issuing out of rents of all the testator's houses, \* 58 farms, cottages, gardens, lands, tithes, hereditaments \* and premises, to be paid to her half-yearly, viz., at Michaelmas-

(a) Page 147.

<sup>1</sup> S. C., 8 H. L. Cas. 225.

<sup>2</sup> In S. C., 8 H. L. Cas. 225, it was held, that in applying the rule that a clear gift in a will is not to be cut down by any subsequent provision, unless the latter is equally clear, the plain intention of the testator, and not the comparative lucidity of the two parts of the will is to be regarded; and it was also held that the gift over affected only the real estate, and the decree was varied accordingly. Another point decided was that the will must be read as if made in 1844; and that the contingency of attaining twenty-one was to be disregarded, and that the gift over took effect on the son dying without issue. See Hearle *v.* Hicks, 1 Cl. & Fin. (Am. ed.) 20, and cases in note (1); Kiver *v.* Oldfield, 4 De G. & J. 29, and cases in note (1).

day and Lady-day, or within fifteen days after such periods arrived, so long as she lived and remained the testator's widow, and to have one of his houses to live in rent free. The testator then gave and devised to his son William Cass Randfield all his personal estate whatsoever and wheresoever. The will contained the following proviso, on which the question on the appeal turned: "But should the hand of death fall on my widow Ann Randfield and son William Cass Randfield, and my having no other children, or my son any issue lawfully begotten, my will is then, that should he leave a widow, that she shall receive the annual sum of 50*l.* sterling during her widowhood out of my real estates, as before mentioned, the residue then to be equally divided share and share alike, after paying such legacies as I may hereafter name, the division of property to be between my late brother Richard Randfield's surviving children and my sister Jessey Warren's children, my sister Rachel Squirrell's children, my niece Grace Beeston and my niece Sarah Stuart, they paying all my son's just debts, funeral expenses and demands, or my wife's, should she be the longest liver."

The testator died in 1844, having had no child but William Cass Randfield, who attained twenty-one, and died in 1856, having given all his property to his wife, who instituted this suit to have it declared that she was entitled to the property given to her husband by William Randfield's will.

The Vice-Chancellor decided in her favour, holding the gift over to be too obscure to control the absolute gift to the son contained in the early part of the will.

\* Some of the defendants who claimed under the gift over \* 59 appealed.

*Mr. Glasse* and *Mr. Dickinson*, in support of the appeal.

*Mr. Baily* and *Mr. Shebbeare*, for the plaintiff.

The following cases were referred to: *Home v. Pillans*, (a) *Edwards v. Edwards*, (b) *Allen v. Farthing*, (c) *Genery v. Fitzgerald*, (d) *Cooper v. Cooper*. (e)

(a) 2 Myl. & K. 15.

(d) Jac. 468.

(b) 15 Beav. 357.

(e) 1 Kay & J. 658.

(c) 2 Jarman Wills, 688.

*Mr. Glasse*, in reply.

At the close of the argument the Lord Chancellor reserved his judgment, saying, that, but for the direction as to the payment of the son's or widow's debts, his Lordship would not have thought the proviso so difficult to construe as the Vice-Chancellor appeared to have considered it.

December 2.

THE LORD CHANCELLOR.—This is a question on the construction of the will of William Randfield. [His Lordship read it.] The question is whether, the testator having given his real and personal estate to his son absolutely, that absolute gift has been divested by the subsequent part of the will in the events \* 60 which have happened. The Vice-Chancellor \* thought it had not, as he could not see distinctly to whom it was intended that the property should go under the subsequent part of the will. I have read the will many times, and although it is the will of a very illiterate or unskilled person, still it appears to me to express an intention that the son should take an absolute interest in the real and personal estate, subject to be divested in the events which have happened, of the testator having had no other child, and of the son himself dying without ever having had a child. Two constructions, which might otherwise have been put on the executory gift, are excluded by the context. For the gift over could not have been intended to take effect on an event which was to happen in the testator's own lifetime, the expression being, "should the hand of death fall on my widow." It was therefore intended to take effect after the testator's death.<sup>1</sup> Nor could it have been intended to take effect in the event of the son not attaining twenty-one, for one of the conditions is, that the devisees over are to pay all the son's "just debts," and he could have had no such debts until he was of age. There remains the construction which I have mentioned, and the case seems to me to be one of a contingent gift, such as is pointed out in the useful judgment of the Master of the Rolls in *Edwards v. Edwards*, (a) where the gift is absolute in the first instance, but if a contingent event

(a) 15 Beav. 363.

<sup>1</sup> See 2 Jarman Wills (3d Eng. ed.), 707.

should happen, as that of the legatee's death without a child, the gift is to go over. I think this an executory devise within the limits prescribed by law, and one to which I am bound to give effect.

The provision as to the payment of the son's or widow's debts is a very strange one, and I do not think \* the question which arises on it ripe for decision. I can only, therefore, reserve liberty to apply upon the death of the widow as to the payment of her debts. I have, however, a strong inclination of opinion that this provision is in the nature of an impossible condition; and that, as it is not a condition precedent, it will be inoperative. I think that the question cannot arise until the widow's death, for the expression is, "debts, funeral expenses, and demands," and I infer from this that the debts meant are those only which she may owe at the time of her death.

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The GOVERNORS OF THE GREYCOAT HOSPITAL v. The  
WESTMINSTER IMPROVEMENT COMMISSIONERS.

1857. December 8. Before the Lord Chancellor Lord CRANWORTH.

Leave given to file a supplemental bill, with a schedule containing the original printed bill.

*Mr. Bacon* and *Mr. G. W. Collins* applied for leave to file a supplemental bill, having annexed to it the original bill, by way of schedule, to save the expense of setting out the original bill in the supplemental bill.

They referred to *Lafone v. Falkland Island Company*, (a) and *Bewley v. Hancock*. (b)

*Mr. Murray*, one of the clerks of records and writs, who attended at their Lordships' request, stated that the objection made at the office to filing the bill with the proposed schedule was that such a proceeding would be contrary to the 49th Order of

(a) 3 K. & J. 267.

(b) Not reported.

August 26th, 1841, and to the practice of the Court, and might lead to great inconvenience, as nineteen-twentieths of the original bill might be impertinent so far as regarded the supplemental suit.

\* 62 \* The Lord Chancellor said that if expense would be saved, that was a good object, and that it did not appear that any harm would be done by acceding to the application. His Lordship directed the bill to be filed, with the schedule, as proposed.

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### BROOKE v. GARROD.

1857. December 9. Before the Lord Chancellor Lord CRANWORTH.

A testator directed his trustees to offer his real estate including a moiety of an estate of which he was tenant in common with his brother to the brother, at a specified sum, but in case the brother should not within a month after the testator's death signify his intention to accept the property at the price, or should not at the expiration of two calendar months from the time of signifying his intention pay the purchase-money to the trustees, then the testator directed the property to be sold by auction. The brother signified his intention to purchase within the month, and required an abstract of the title. None was furnished to him within two months after the signification of his intention to purchase, and the purchase-money was not paid at the expiration of that time: *Held*, that the right of pre-emption was lost.<sup>1</sup>

THIS was an appeal from a decision of Vice-Chancellor WOOD, holding that a right of pre-emption under a will had ceased, and directing a sale by auction. The case is reported in the 3d volume of Messrs. Kay & Johnson's Reports. (a)

The testator Henry Garrod, by his will dated in 1856, directed his trustees to offer all his real estate to his brother Mallows, if he should be living at the time of the testator's decease, at the price or sum of 2500*l.*, to be paid to the trustees, and to be by them applied as therein mentioned, and upon such payment of the said

(a) Page 608.

<sup>1</sup> See Fry Spec. Perf. (2d Am. ed.) 424; 1 Dart V. & P. (4th Eng. ed.) 193, 194, 386, 387; 1 Sugden V. & P. (8th Am. ed.) 188, note (I); Austin v. Tawney, L. R. 2 Ch. Ap. 143.

sum of 2500*l.* by his said brother as aforesaid, then he directed his trustees to convey the premises to the brother, his heirs, and assigns; but in case the brother should not be living at the time of the testator's decease, or should not within one calendar month after that event signify to the trustees his intention to accept or take the premises at the price aforesaid, or should not at the expiration of two calendar months from the time of signifying such his \* intention pay the said sum of 2500*l.* to the said \*63 trustees as aforesaid, then the testator directed his trustees to sell the premises by public auction or private contract, as in his will mentioned; and the testator directed his trustees to stand possessed of the moneys to arise from such sale, or in the event of the brother electing to accept and take the premises at the price or sum aforesaid, then to stand possessed of the said sum of 2500*l.* upon certain trusts for the benefit of another brother and the sisters of the testator.

The testator died on the 11th of October, 1856.

On the 29th of October, 1856, the brother, through his solicitor, signified to the trustees of the will his intention to become the purchaser of the property for 2500*l.*

On the 1st of November, his solicitor wrote to the solicitor of the trustees the following letter: "I did not know until to-day that you were concerned for the executors herein. My client, Mr. Mallows Garrod, wrote to me on the 28th ult. requesting me to give notice to his late brother's executors that he would accept the estate at the price it was directed to be offered to him, and to-day he has called with a copy of his brother's will and placed the matter in my hands. I presume there will be no difficulty in carrying out the testator's directions, as Mr. Mallows Garrod, through me, has signified his intention to take the estate at the price fixed thereon by his brother, and I have informed the executors thereof. I will thank you, therefore, to send me the necessary abstracts of title as early as possible, that the matter may be carried through in accordance with the testator's will."

\* In answer to this letter, the solicitor of the trustees \*64 wrote as follows: "I beg to acknowledge the receipt of your favour, and will take an early opportunity of seeing my clients thereon."

Nothing further passed between the parties until the 14th of January, nor was any abstract of title furnished on the part of the

trustees ; neither was the purchase-money paid, nor was any conveyance tendered on the part of Mr. Mallows Garrod.

The Vice-Chancellor held that, as the payment had not been made within the prescribed time, the right of pre-emption was gone. From this decision Mr. Mallows Garrod appealed.

*Mr. Osborne* and *Mr. Hastings*, in support of the appeal.—It was not the appellant's fault that the purchase was not completed by the prescribed time, and the testator could not have intended to deprive him of the benefit of pre-emption by reason of the default of the trustees. To impute such an intention to the testator is to say that he meant to leave it to the trustees to say whether the appellant was to have the benefit intended for him or not.

They referred to *Gaskell v. Harman*, (a) *Hutcheon v. Mannington*, (b) *Lechmere v. Carlisle*, (c) and *Earl of Radnor v. Shafio*. (d)

*Mr. Bevir*, for the trustees.

\* 65 \* *Mr. Dart* (with whom was *Mr. Rolt*), for William Garrod and his sisters.—The case of a contract, in which time is not made of the essence of it, is very different from a power of pre-emption, the exact terms of which must be fulfilled.

He referred to *Barrell v. Sabine*, (e) *Davis v. Thomas*, (g) *Pegg v. Widden*, (h) *Master v. Willoughby*, (i) *Dawson v. Dawson*. (k)

*Mr. Osborne*, in reply.

*Pegg v. Widden* is in the appellant's favour, for it shows that time is not considered conclusive, and in *Master v. Willoughby* there was nothing to be done but paying the money, no production

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| (a) 11 Ves. 489.    | (g) 1 Russ. & My. 506. |
| (b) 1 Ves. Jr. 366. | (h) 16 Beav. 239.      |
| (c) 8 P. Wms. 215.  | (i) 2 Bro. P. C. 244.  |
| (d) 11 Ves. 448.    | (k) 8 Sim. 346.        |
| (e) 1 Vern. 268.    |                        |

of title or conveyance being required as there are here. *Dawson v. Dawson* is also distinguishable. It is said that the terms of a power are to be more strictly followed than those of a trust. There is no authority for such a proposition. He also referred to *Earl of Radnor v. Shaflo.* (a)

THE LORD CHANCELLOR. — My first impression was in favour of the appellant, but that has been removed by the argument of *Mr. Dart*, for I concur with the Vice-Chancellor in thinking, that Mr. Garrod has not brought himself within the conditions prescribed by the will. The testator having his brother, a single man, living with or near him, and thinking that this brother would probably desire to buy the moiety in question, being himself tenant of the other moiety in the property, made his will and \* 66 gave this direction : [His Lordship read the clause.] What happened was this : Within one month after the death of the testator the brother formally signified his intention to take the property according to the direction in the will. That offer was made on the 29th of October. According to the terms of the will he was bound to pay the purchase-money of 2500*l.* before the 29th of December. He did not pay the money at that time. Is he then within the terms of the will ? Clearly not within the words. It is said, that although he did not pay within the time, he did what ought to be considered as equivalent to payment, or ought to exonerate him from any charge of neglect. Now, I have more than once had occasion to say, that I think this Court has gone to too great an extent in departing from the precise terms of the contracts into which parties have entered, and so in effect making other contracts for them. If a contract can, by fair construction, be divided into two contracts, i.e. one contract to do an act and another to do it at a certain time, the Court may say that these are independent stipulations. But if the contract be that on payment of a sum of 1000*l.* at or before a specified day, a certain act shall be done on my part, I am at a loss to see why I can properly be called on to do the act if the money be not paid at the day ; or why I should be compelled to perform not my contract, but another contract into which I have not entered. If cases are found in the books, which go to that extent, I can only say that I cannot see

the principle on which they are founded. No authority has, however, been produced, in which this Court has varied the terms of a gift under which a benefit is to be taken. The rule there is, "cujus est dare ejus est disponere," and if the donor choose to say that in the event of a person paying 2500*l.* on or before a specified day the gift shall take effect, I do not see how the \* 67 Court, if the money is not paid on or before \* the day, can take any thing as an equivalent for the payment at the prescribed time.

There may be a distinction where a person, being ready and willing to comply with a condition, has been prevented from so doing. That raises a question of a different class, and I should be loth to say, that the Court would not find the means of giving relief if the donee had done all that in him lay, and if the delay was to be attributed to the other contracting party. *Mr. Osborne* ingeniously tried to show that this was the state of circumstances here, and that although the payment was not made within the two months, yet, as this was prevented by the conduct of the trustees, the right continued.

Now, that alleged prevention was of this nature: The brother's solicitor, within a day or two after his acceptance of the offer, wrote to the solicitor of the trustees announcing that his client had accepted the offer, and requiring them to send an abstract. Nothing more was done for two months; and what *Mr. Osborne* argued was this, that it was the duty of the trustees to send an abstract, and that it was impossible for Mr. Mallows Garrod to prepare his conveyance till he had got an abstract, and that since he could not get this abstract the omission to comply with the condition was occasioned by the trustees' fault. There are, however, several fallacies in that argument. In the first place, I do not read this will as only requiring the brother to pay the 2500*l.* if he should get the conveyance within two months. The testator appears to me to have meant, that the money should be in the hands of his trustees within the two months. *Mr. Osborne* read the devise as if it had been one upon the condition of the brother's paying 2500*l.* within two months, provided he was enabled, \* 68 by proper conduct on \* the part of the trustees, to obtain a conveyance, or otherwise on condition of his paying the amount when he did get a conveyance. That, however, would be making a new will for the testator. He meant that no delay, on

the part of the lawyers, should prevent the money from being paid to the trustees. That goes to the root of the case.

Even if that were not so, I am not prepared to say that the want of a proper conveyance before the prescribed time ought to be attributed to the trustees, although they ought, I think, to have communicated with Mr. Mallows Garrod's solicitor. They excuse themselves by saying, that there was no occasion for furnishing an abstract at all, which, as the brothers were tenants in common, was probably a correct view of the case. The brothers had, moreover, as I have said, been living together, or close to one another, and there is little doubt that the testator knew the state of the title as well as his brother.

However this may be, I think that to hold that the time prescribed by the testator may be extended upon the ground that Mr. Mallows Garrod did not get an abstract, would be to step beyond the province of the Court and beyond the intention of the testator.

I think the judgment of the Vice-Chancellor right, and that the appeal should be dismissed with costs.

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\* In the Matter of The WELSH POTOSI LEAD AND \* 69  
COPPER MINING COMPANY, limited, and of The  
JOINT-STOCK COMPANIES ACT, 1856.

#### LOFTHOUSE'S CASE.

1857. December 15. Before the Lord Chancellor Lord CRANWORTH and the  
LORDS JUSTICES.

A shareholder in a mining company on the cost-book principle gave notice, according to the rules of the company, of his ceasing to be a member of it. Afterwards the company was registered under the Joint-stock Companies Act, 1856, as a limited company, and was subsequently wound up: *Held*, that the shareholder was not liable to be placed on the list of contributories of the company ordered to be wound up.

THIS was an appeal from the decision of Mr. Commissioner FANE, placing the appellant Mr. Lofthouse on the list of contributories of the above company under the Joint-stock Companies Act,

1856, of which the following sections are those on which the questions principally turned.

Sect. 16. Every company registered under this Act hereinafter referred to as the company shall cause to be kept in one or more books a register of shareholders, and there shall be entered therein the following particulars: (1) The names, addresses, and occupations (if any) of the shareholders in the company, and the shares held by each of them, distinguishing each share by its number. (2) The amount paid on the shares of each shareholder. (3) The date at which the name of any person was entered in the register as a shareholder. (4) The date at which any person ceased to be a shareholder in respect of any share.

19. No notice of any trust express or implied or constructive shall be entered on the register or receivable by the company, and every person who has accepted any share in a company registered under this Act, and whose name is entered in the register of shareholders, and no other person (except a subscriber to the memorandum of association in respect of the shares subscribed for by him) \* shall for the purposes of this Act be deemed to be a shareholder.

\* 70 22. The amount of calls for the time being unpaid on any share shall be deemed to be a debt due from the holder of such share to the company.

61. In the event of any company being wound up by the Court or voluntarily, the existing shareholders shall be liable to contribute to the assets of the company to an amount sufficient to pay the debts of the company, and the costs, charges, and expenses of winding up the same, with this qualification, that if the company is limited no contribution shall be required from any shareholder exceeding the amount (if any) unpaid on the shares held by him.

63. In the event of any limited company being wound up by the Court or voluntarily, any person who has ceased to be a holder of any share or shares within the period of one year prior to the commencement of the winding up shall be deemed for the purposes of contribution towards payment of the debts of the company, and the costs, charges, and expenses of winding up the same, to be an existing holder of such share or shares, and shall have in all respects the same rights, and be subject to the same liabilities to creditors as if he had not so ceased to be a shareholder.

71. If at the expiration of the time named in such order or interlocutor such payment is not made or security given, the Court may thereupon make an order or decree for winding up the company.

111. In the case of any other company duly constituted by law previously to the passing of this Act, and \* consisting \* 71 of seven or more shareholders, if it is not intended to be registered as a limited company, there shall be delivered to the registrar of Joint-stock Companies such list of shareholders as is hereinbefore mentioned, and also a copy of any Act of Parliament, royal charter, letters-patent, deed of settlement, or other instrument constituting or regulating the company.

113. Upon compliance with the foregoing requisitions the registrar of Joint-stock Companies shall certify under his hand that the company so applying for registration is incorporated as a company under this Act, and in the case of a limited company that it is limited, and thereupon such company shall be incorporated accordingly; and all provisions contained in any deed of settlement, Act of Parliament, royal charter, or letters-patent, or other instrument constituting or regulating the company shall be deemed to be regulations of the company within the meaning of this Act, and all the provisions of this Act shall apply to such company in the same manner in all respects as if it had been originally incorporated under this Act, subject nevertheless to the reservations hereinafter contained with respect to the existing rights of creditors and other persons.

The company was established in September, 1858, upon the cost-book system, for working certain copper and lead mines situate at Aberystwith, under the management of certain directors and a purser or secretary.

Certain rules and regulations founded on the cost-book system were agreed on for the management and conduct of the company, and the 27th of these rules provided that upon any requisition being made to the purser by the holder of any certificate of shares, and \* upon such certificate being registered in the \* 72 cost book in the name of such holder, the purser should make an entry in the cost book of such registration against the name of the person (if any) who should appear therein as the theretofore registered holder of the shares specified in such certifi-

cate, and the interest of such person in such shares should thereupon cease, and he or she should be thereupon freed from all future liabilities in respect thereof.

It appeared that in October, 1856, steps were taken, in which Mr. Lofthouse concurred, for the purpose of registering the company under the Joint-stock Companies Act, 1856, but before this was done, and in January, 1857, Mr. Lofthouse sold his shares to a Mr. Slack, to whom they were regularly transferred according to the requirements of the cost book.

On the 26th of June, 1857, the company was registered as a limited company under the Joint-stock Companies Act, 1856, and the name of Mr. Lofthouse was not included in the list sent to the registrar.

On the 23d of July, 1857, an order was made for winding up the company, and the commissioner, in settling the list of contributories, placed the name of Mr. Lofthouse upon it.

Mr. Lofthouse appealed.

*Mr. Bacon* and *Mr. Doria*, in support of the appeal, referred to sections 19, 61, and 63 of the Act, and to *Fenn's Case*, (a) *Mary-hew's Case*, (b) *Libri's Case*, (c) *Ex parte Stirling*. (d)

\* 73     \* *Mr. Selwyn* and *Mr. Roxburgh*, for the official liquidator.

— Decisions on the former Winding-up Acts are not necessarily authorities with respect to this Act, which has different objects, and is administered in different Courts and in a different mode. One essential difference is, that the present Act is passed for the benefit of creditors as well as of contributories, instead of being designed, as the former Acts were, merely to supply a more convenient mode of administering the rights of shareholders *inter se*. A primary object of the present Act is the payment of the company's debts. This Act cannot be construed, therefore, merely with reference to the decisions of the former. Here the terms of the 63d section are express, and provide that any person who has ceased to be a holder of shares, within the period of one year prior to the commencement of the winding up, shall be deemed for the purposes of contribution towards the payment of the debts of the company, and the costs of winding up, to be an existing

(a) 4 De G., M. & G. 285.

(c) 30 Law T. 185.

(b) 5 De G., M. & G. 897.

(d) 6 Irish Com. Law & Ch. 180.

holder of such shares. This description clearly applies to the respondent.

*Mr. Bacon* was not called on to reply.

THE LORD CHANCELLOR.—The first point raised by the respondents is, that the transfer to Slack was purely colourable, and only for the purpose of getting rid of Lofthouse's liability. But it is competent for shareholders in cost-book companies, if they choose, at any time to give up their shares,<sup>1</sup> and, therefore, it is probably true that Lofthouse had, with the object imputed to him, transferred his shares to Slack. It is immaterial, however, to consider this question, for the company, on the face of the certificate \* of transfer, permitted him to alienate his shares, and made no objection to his doing so. Therefore Mr. Lofthouse, to all intents and purposes, ceased to be an actual partner in the company in January last. In June last, the company was registered under the Joint-stock Companies Act of 1856, for the purpose of having the concern wound up. A petition was presented for the winding up, when it became the duty of the Court of Bankruptcy to settle the list of contributories, and the commissioner placed on the list not only Mr. Slack, but also Mr. Lofthouse, and the question is, whether the commissioner was or was not justified in placing Mr. Lofthouse on the list.

That Mr. Lofthouse was not on the registered list of shareholders is quite clear, and the 61st section of the statute provides: [His Lordship read the section.] Then comes the 63d section, which provides: [His Lordship read it.] The commissioner has placed Mr. Lofthouse on the list, on the ground that he within a year ceased to be a holder of shares. In my opinion that was a mistake, for I think the word "holder" must be interpreted as meaning a person who has held shares after the liability has arisen under the operation of this Act of Parliament. A contrary construction would lead to injustice, for it would enable the former partners of a shareholder, by registering the company after he has ceased to be a partner, to increase and alter his liability. All, however, that we have occasion here to do, is to attend to the terms of the Act of Parliament itself. The word holder must

<sup>1</sup> See Birch's Case, *ante*, 10.

mean holder of shares under this Act of Parliament. On that short ground the point seems clear ; and although we differ from the commissioner, we do so with less reluctance, inasmuch as his first impression appears to have been in accordance with ours.

A doubt passed through my mind, whether we ought \* 75 \* to stir in this case, for I doubted whether, if Mr. Lofthouse's name remained on the list, there would be any mode of enforcing the payment of one shilling by him, the only mode of enforcing a call appearing to be by an action. [His Lordship read the 22d section.] And in order to bring the case within the Act, so as to recover in an action for a call, one of the first averments would have to be, that Mr. Lofthouse was within the statute by having been within one year a holder of a share. In my opinion he never was a shareholder, and if so, there would be no means of proving the averment, so that the call would be ineffectual. But I think he is entitled to be discharged from the call, without putting him to defend an action.

THE LORD JUSTICE KNIGHT BRUCE.—I think, that in the circumstances of this case, the Court had no jurisdiction to place Mr. Lofthouse on the list.

THE LORD JUSTICE TURNER.—The 19th section provides : [His Lordship read it.] The plain answer to the demand is, that Mr. Lofthouse never was a holder of shares, nor did he accept any in a company registered under this Act of Parliament. The registration is that referred to in the 16th section, which provides,— [his Lordship read it:] and the company is to be registered according to the Act. It is, however, said that the 63d section extends to the case, Mr. Lofthouse having ceased to be a holder of shares within one year before the winding up. But the allegation of his ceasing to be a shareholder imports that he has been a holder, that is, a holder of shares in a company within this \* 76 Act, which he never has been. Neither is the \*case reached by the 111th or 113th sections. The 113th section does not alter the construction of the previous provisions, and leaves the question open upon the 19th section.

Order discharged, with costs out of the estate.

## WARDEN v. JONES.

1857. November 7, 12. December 17. Before the Lord Chancellor Lord CRANWORTH.

Previously to a contemplated marriage, the intended husband and wife went to a solicitor to have a settlement prepared of some railway stock of which the intended wife was the registered proprietor, but which was subject to a mortgage, and the certificates of which were in the hands of the mortgagee. The solicitor not being able to prepare the settlement before the time fixed for the marriage, the husband told the wife that it would be equally good if made afterwards, and no settlement or agreement for a settlement was made in writing before the marriage. Shortly after the marriage a settlement was executed, whereby the husband covenanted to invest part of the proceeds of the stock upon trusts for the benefit of his wife and children. He sold the stock, paid off the mortgage, and invested the stipulated amount according to his covenant: *Held*, —

1. That the settlement was voluntary and fraudulent, and therefore void as against creditors.
2. That the wife had no equity to a settlement.<sup>1</sup>

THIS was an appeal from the decision of the Master of the Rolls, setting aside a post-nuptial settlement as fraudulent against the creditors of the settlor.

At the time of the settlor's marriage his intended wife was the registered proprietor of 1000*l.* stock of the Lancashire and Yorkshire Railway Company, and according to the Company's Act and to the Companies Clauses Consolidation Act incorporated therewith, the stock, when held by any female proprietor, passes upon her marriage to her husband, unless a settlement or agreement for a settlement is made or entered into on the marriage, and the company does not recognize the wife after the marriage as the proprietor of the stock, the husband having immediately upon the marriage, and without notice, power to sell the stock upon the production \* of a copy of the marriage certificate, and a \* 77 declaration verifying the same, and identifying the wife as the proprietor registered in the books of the company. The husband may in this manner sell and transfer to a purchaser, but the

<sup>1</sup> See 2 Story Eq. Jur. § 987 a.

company does not register the transfer until the husband is recognized as proprietor by his name being registered as such.

According to the evidence on behalf of the wife, she and her intended husband went together to a solicitor a few days before the marriage to have a settlement prepared of the stock. The solicitor, however, could not prepare the settlement in time for the marriage, and the intended husband told the intended wife that the settlement would be equally good if prepared afterwards.

The stock was subject to a mortgage for 260*l.*, and the stock certificates were in the hands of the mortgagee.

The marriage took place on the 16th of June, 1855, without any settlement or agreement for a settlement having been made in writing, but on the 6th of July following a settlement was executed. It was dated on that day, and made between Charles William Henry Barnett and Elizabeth his wife (the husband and wife) of the one part, and Thomas Williamson Jones and George Sneade of the other part, and thereby, after reciting the marriage and that no settlement was executed between Charles William Henry Barnett and Elizabeth his wife previous to their said marriage, and that the said Elizabeth Barnett was at the time of her said marriage possessed of or entitled to the sum of 1000*l.* stock of the Lancashire and Yorkshire Railway Company, subject nevertheless and charged with the payment of 260*l.* to Jonathan Jones therein

described for money advanced by him to Elizabeth Barnett  
\* 78 previous to her marriage, with interest thereon, \* and that

it had been agreed between Charles William Henry Barnett and Elizabeth his wife that the said sum of 1000*l.* stock of the Lancashire and Yorkshire Railway Company should be forthwith sold, and that the produce thereof should be applied first in payment of the said sum of 260*l.* and interest so due and owing to the said Jonathan Jones as aforesaid, then in the purchase of the sum of 500*l.* 3*l.* per cent reduced bank annuities in the names of Thomas Williamson Jones and George Sneade, and settled as thereafter mentioned, and that the residue thereof should be retained by the said Charles William Henry Barnett and Elizabeth his wife, for their own use and benefit. It was witnessed that for the considerations therein mentioned, he Charles William Henry Barnett, for himself, his heirs, executors, and administrators, and for the said Elizabeth his wife, covenanted with the said Thomas

Williamson Jones and George Sneade, and the survivor of them, and the executors and administrators of such survivor, that they, the said Charles William Henry Barnett and Elizabeth his wife, would forthwith sell the said sum of 1000*l.* stock of the Lancashire and Yorkshire Railway Company, and within one calendar month from the date of the deed invest a sufficient part of the proceeds in the purchase of 500*l.* 3*l.* per cent reduced bank annuities in the names of Thomas Williamson Jones and George Sneade, and that the said bank annuities should be held by the said Thomas Williamson Jones and George Sneade upon the trusts therein declared. And it was further witnessed that in consideration of the said marriage and for making some provision for the said Elizabeth Barnett, and for the issue (if any) of the same marriage, the said Charles William Henry Barnett and Elizabeth his wife thereby respectively directed and appointed that the said Thomas Williamson Jones and George Sneade, their executors, administrators, and assigns, should stand and \* be possessed of the said bank annuities, and the dividends thereon, upon trust during the joint lives of the said Charles William Henry Barnett and Elizabeth his wife for the sole and separate use of the said Elizabeth Barnett, without power of anticipation; and in case the said Charles William Henry Barnett should die in the lifetime of the said Elizabeth Barnett, upon trust to assign the said bank annuities unto the said Elizabeth Barnett, for her own absolute use and benefit; but in case the said Elizabeth Barnett should die in the lifetime of the said Charles William Henry Barnett, upon trust to pay the dividends of the said bank annuities unto the said Charles William Henry Barnett for his life, and from and after his decease upon the trusts therein mentioned for the issue, if any, of the said marriage; and in case there should be no child or children of the said marriage, or none who should attain the age of twenty-one years or marry as therein mentioned, upon such trusts and for such purposes as the said Elizabeth Barnett should appoint as therein mentioned, and in default of appointment in trust for the next of kin of the said Elizabeth Barnett.

On the day of the date of the settlement the husband, with the concurrence of the wife, sold and transferred the stock, and received the purchase-money, amounting to about 880*l.* Of this amount, 270*l.* was applied in discharge of the principal and inter-

est due on Mr. Jones's incumbrance, and in paying expenses. Out of the residue 500*l.* reduced bank annuities was purchased and settled on the above-mentioned trusts.

The Master of the Rolls held the settlement to be void against the plaintiff. The case is reported in the 23d volume of Mr. Beavan's Reports. (a)

The wife appealed.

\* 80 \* *Mr. R. Palmer* and *Mr. Sidney Smith*, for the plaintiff.—The defence is twofold: first, it is said that as the plaintiff sues in equity for the proceeds of the wife's interest in the stock she has an equity to a settlement out of them. Secondly, a parol ante-nuptial agreement is relied upon.

With regard to the former of these defences, the Companies Clauses Consolidation Act, 1845, incorporated in the Act of this company, constituted such a title as the wife had in these shares a legal, and not merely an equitable, interest. And the mere circumstance that the plaintiff is suing in a Court of Equity does not entitle the wife to a settlement. *Hill v. Edmonds.* (b)

With regard to the latter ground of defence, *Randall v. Morgan* (c) shows that a parol ante-nuptial agreement does not prevent a post-nuptial settlement from being merely voluntary, and if *Dundas v. Dutens* (d) be inconsistent with *Randall v. Morgan*, (c) it must be considered as overruled by that decision. *Dundas v. Dutens* is, however, distinguishable from the present case, as there was in the settlement a recital of an ante-nuptial agreement, on which the Lord Chancellor relied. It may be well doubted whether that circumstance was a sufficient ground for the decision, but at all events it does not exist in the present case.

They also referred to *Montacute v. Maxwell*, (e) *Fitzer v. Fitzer*, (g) *Lassence v. Tiernay*. (h)

\* 81 *Mr. Lloyd* and *Mr. Langworthy*, for the appellant.—*Dundas v. Dutens* (d) has never been overruled, and \* it applies to the present case. At all events, the representation made

(a) Page 487.

(e) 1 P. Wms. 618.

(b) 5 De G. & S. 603.

(g) 2 Atk. 511.

(c) 12 Ves. 67.

(h) 1 Mac. & G. 551.

(d) 1 Ves. Jr. 199.

by the husband before the marriage was one which he was bound to make good according to the principles on which this Court has always acted. *Hammersley v. De Biel*, (a) *Surcome v. Pinniger*, (b) *Jordan v. Money*, (c) *Page v. Horne*. (d)

It is not, however, necessary to go to the extent of deciding, whether it could be enforced, the only question before the Court being, whether the deed was fraudulent within the statute of Elizabeth. Now it is to be observed, that the word "voluntary" does not occur in the Act, and a voluntary deed is only void because, in general, it is a fraudulent deed. Where, however, there is a parol antenuptial agreement, the fulfilment of it cannot be held to be fraudulent. A voluntary agreement can be only considered fraudulent when no circumstance is in evidence to show that the intent was otherwise than to delay creditors. This does not apply where the circumstances of the case show a *bona fide* motive of a different kind, and where, indeed, there is a moral obligation, of which the non-performance would constitute a fraud, but the performance cannot. There is a remarkable difference between the 4th section of the Statute of Frauds and the 5th and 7th sections of that Act. The 4th section only provides, that no action shall be brought, and does not say that the parol agreement shall be null or void, as the 5th and 7th sections do as to wills and declarations of trust. Here no action is necessary, the husband was not bound to make an objection on the ground of the Statute of Frauds, and the contract has been completed. What is sought is to set \* it aside, there being nothing in the \* 82 Act to warrant such a proceeding. Moreover, the execution of the settlement was a part performance.

This was not a description of property that could be taken by a creditor, for it was not standing in the name of the husband or of a trustee for him, therefore is not within the Act of Elizabeth.

At all events the wife had an equity to a settlement.

They referred to *Kinderley v. Jervis*, (e) *Wildman v. Wildman*, (g) *Ryland v. Smith*, (h) *Battersbee v. Farrington*, (i) *Lavender v. Blackstone*. (k)

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|---------------------------|-------------------|----------------------|
| (a) 12 Cl. & Fin. 45.     | (d) 11 Beav. 227. | (h) 1 Myl. & Cr. 53. |
| (b) 3 De G., M. & G. 571. | (e) 22 Beav. 1.   | (i) 1 Swanst. 106.   |
| (c) 5 H. L. Cas. 185.     | (g) 9 Ves. 174.   | (k) 2 Lev. 146.      |

*Mr. R. Palmer*, in reply.

Judgment reserved.

THE LORD CHANCELLOR.—This is a bill filed by a creditor of defendant Charles W. H. Barnett to set aside a postnuptial settlement, under these circumstances.

On the 16th June, 1855, Mr. Barnett married Elizabeth Jones, and no settlement nor any written agreement for a settlement was made before the marriage.

\* 83 Elizabeth Jones was entitled to 1000*l.* stock of the \* Lancashire and Yorkshire Railway Company, subject to a charge thereon of 260*l.* to her brother Jonathan Jones.

On the 6th July, 1855, a settlement was made, whereby part of the proceeds of the stock was covenanted to be invested upon trust for the separate use of Elizabeth during the joint lives of herself and her husband, and, after his decease, subject to a trust for the children of the marriage, for her absolutely. The stock was sold, and a portion of the proceeds invested according to the covenant in the settlement.

On the 12th May, 1856, the plaintiff recovered judgment for 319*l.* 19*s.* 11*d.* against Mr. Barnett, and the question is as to the validity of the settlement as against the plaintiff and Mr. Barnett's other creditors.

The Statute of Frauds provides, that “No action shall be brought whereby to charge any person upon any consideration of marriage unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith.”

Here there was no such agreement, and therefore this settlement was voluntary, and if voluntary, then according to the authorities it is void against creditors under the 13th Eliz. c. 5. On behalf of the wife an attempt has been made to support the settlement on the ground of a parol promise made before the marriage, and for the purpose of the argument I will assume a parol promise to be proved, if that were a question respecting which I could enter upon an inquiry. The law has, however, wisely forbidden this. Persons are so likely to be led into such prom-

\* 84 ises inconsiderately, that the law has wisely \* required them

to be manifested by writing ; and it is the duty of this Court to act in conformity with the statute, and not to endeavour to escape from its generally very salutary enactments in consequence of its operating harshly in a particular case.

The argument here was, first, that the parol agreement being proved, the parties were under a moral, though not legal, obligation to perform it, so that the settlement could not be fraudulent. To this, however, the judgment of Lord NORWICH in *Spurgeon v. Collier*, (a) affords a conclusive answer, — “ If such a parol agreement were to be allowed to give effect to a subsequent settlement, it would be the most dangerous breach of the statute and a violent blow to credit. For any man, on the marriage of a relation, might make such promise of which an execution never could be compelled against the promisor ; and the moment his circumstances failed he would execute a settlement pursuant to his promise and defraud all his creditors.” It was next contended there was fraud because the husband told his intended wife that the settlement would be as valid after as before marriage.<sup>1</sup> But there is no proof that this was said fraudulently. It was said, on the occasion of the visit to the solicitor mentioned in the affidavit. She might have consulted the solicitor, and I cannot infer that she was more ignorant of the law than her husband. Both consulted Mr. Massey.

It was hardly argued that the marriage was a part performance. That is clearly not so.<sup>2</sup> Where, indeed, one of the contracting parties agrees, as the consideration for the marriage, to do something more than marry, as to settle an estate, and in consideration of that promise \* the other party either acting for \* 85 her or him contract to make a settlement, then the settlement made by the one contracting party is a good act of part performance. *Hammersley v. De Biel*. (b) In this case, however, there is nothing of that sort.

Nor are we embarrassed here by the question which has sometimes arisen ; namely, that the postnuptial settlement is recited to be made in pursuance of an antenuptial agreement. Lord THUR-

(a) 1 Eden, 61.

(b) 12 Cl. & Fin. 45 ; [2 Dart V. & P. (4th Eng. ed.) 940, 941].

<sup>1</sup> See the remarks of Judge Story upon this subject in *Jenkins v. Eldredge*, 3 Story, 291, 292.

<sup>2</sup> See *Fry Spec. Perf.* (2d Am. ed.) 249, 250, 263, 264.

LOW decided in *Dundas v. Dutens* (*a*) that such a settlement is good, and on that decision I will only remark that if it be a correct view of the law, the whole policy of the statute is defeated. It cannot be enough merely to say in writing that there was a previous parol agreement. It must be proved that there was such an agreement, and to let in such proof is precisely what the statute meant to forbid. Sir WILLIAM GRANT clearly thought that a written recognition after marriage of a verbal promise made before marriage would be invalid. One question in *Randall v. Morgan* (*b*) was whether a letter, written by the father of the wife after the marriage, amounted to a promise to give a bond, or to a recognition of a previous verbal promise to do so. Sir WILLIAM GRANT, after observing that if it was a promise made after marriage to give a bond, then it was *nudum pactum*, goes on to say, "supposing, however, that this letter refers to some parol promise before the marriage, I doubt extremely whether that would be sufficient to entitle the Court to construe this into an acknowledgment of a debt, for the promise, being in itself a nullity, producing no obligation, a written recognition after the marriage would give it no validity."

\* 86 \* This most reasonable construction of the statute is consistent with the decision of Lord COTTENHAM in *Lassence v. Tierney*, (*c*) and though the precise question does not arise in the case now before me, I have thought it right to advert to these authorities, in order that it may not be thought I decide the present case merely on the ground that it is distinguishable from *Dundas v. Dutens*.

I incline to think that, even if this settlement had contained a statement that it was made in pursuance of a previous antenuptial parol agreement, I should still have considered it, as I now consider it, void against creditors.

It was contended that the property of which this lady was possessed at the time of her marriage could not have been taken at the suit of a creditor, and so that the Statute of Elizabeth does not apply. But this is not so. For by the 14th section of 1 & 2 Vict. c. 110, it was enacted, "That if any person against whom any judgment shall have been entered up in any of her Majesty's Superior Courts at Westminster shall have any government stock,

(*a*) 2 Cox, 235.

(*b*) 12 Ves. 73.

(*c*) 1 Mac. & G. 551.

funds, or annuities, or any stock or shares of or in any public company in England (whether incorporated or not), standing in his name in his own right, or in the name of any person in trust for him, it shall be lawful for a Judge of one of the Superior Courts, on the application of any judgment creditor, to order that such stock, funds, annuities, or shares, or such of them or such part thereof respectively as he shall think fit, shall stand charged with the payment of the amount for which judgment shall have been so recovered, and interest thereon, and such order shall entitle the judgment creditor to all such remedies as he would have been entitled to if such \*charge had been made in his \* 87 favour by the judgment debtor: provided that no proceedings shall be taken to have the benefit of such charge, until after the expiration of six calendar months from the date of such order."

The interest of this lady at her marriage was clearly an interest in stock of a public company, standing in her name, and by the marriage the legal right to the stock was by act of law vested in the husband. He by his marriage acquired a legal right to dispose of the stock as he thought fit, and though it appears by the evidence that the wife joined in making the transfer, this was not necessary to its validity. It was merely a reasonable precaution on the part of the company, as it saved the necessity of afterwards proving the marriage.

The fact of the certificates being mortgaged clearly makes no difference.

I think that there is no equity for a settlement, and that the husband was only exercising a legal right.

I think the judgment of the Master of the Rolls right, and that the appeal must be dismissed with costs.

\* 88 \* In the Matter of CHARLOTTE BLOOMAR, a Lunatic,  
and in the Matter of THE TRUSTEE ACT, 1850, and  
in the Matter of THE LUNACY REGULATION ACT, 1853.

SINGLETON *v.* HOPKINS.

BASFORD *v.* HOPKINS.

1857. December 22. Before the LORDS JUSTICES.

Where in a suit for the partition of lands in which the lunatic was entitled to an undivided share, a partition had been made and the lunatic declared a trustee within the Trustee Act, 1850: *Held*, on a petition by the lunatic to have the partition carried into effect, that the Lords Justices could, under the Trustee Act, 1850, and the Lunacy Regulation Act, 1850, direct the committee to convey according to the partition.<sup>1</sup>

THIS was the petition of a lunatic by the committee of her person, praying that the estate and interest of the petitioner in certain hereditaments of which a partition had been made in a partition suit might be vested in the committee of her estate to give effect to the partition.

The petition was presented under the Trustee Act, 1850, and under the Lunacy Regulation Act, 16 & 17 Vict. c. 70. The material portions of the former are as follows:—

Sect. 3. "That when any lunatic or person of unsound mind shall be seised or possessed of any lands upon any trust, or by way of mortgage, it shall be lawful for the Lord Chancellor, intrusted by virtue of the Queen's sign-manual with the care of the persons and estates of lunatics, to make an order that such lands be vested in such person or persons in such manner and for such estate as he shall direct; and the order shall have the same effect as if the trustee or mortgagee had been sane, and had duly executed a conveyance or assignment of the lands in the same manner for the same estate."

\* 89 \* Sect. 30. "That where any decree shall be made by any Court of Equity for the specific performance of a contract

<sup>1</sup> See 2 Dan. Ch. Pr. (4th Am. ed.) 1162.

concerning any lands, or for the partition or exchange of any lands, or generally when any decree shall be made for the conveyance or assignment of any lands, either in cases arising out of the doctrine of election or otherwise, it shall be lawful for the said Court to declare that any of the parties to the said suit wherein such decree is made are trustees of such lands, or any part thereof, within the meaning of this Act."

The material section of the latter Act is as follows:—

Sect. 124. "Where a lunatic is seised of or entitled to an undivided share of land, and it appears to the Lord Chancellor, intrusted as aforesaid, to be for his benefit and to be expedient that a sale of the land or part thereof, or a partition of the land, should be made, and where a lunatic is seised of or entitled to land and it appears to the Lord Chancellor, intrusted as aforesaid, to be for his benefit and to be expedient that an exchange thereof, or part thereof, for other land should be made, the committee of the estate, in the name and on behalf of the lunatic, under an order of the Lord Chancellor, intrusted as aforesaid, may concur with such other person in making such sale or partition, or may make such exchange and receive such moneys payable on the sale, and give or receive such moneys for equality of partition or exchange, or otherwise in relation thereto, as the order may direct, and all moneys received by the committee of the estate upon any such sale, partition, or exchange as aforesaid shall be applied and disposed of in manner directed in section 135 of this Act respecting the fines, premiums, and sums of money therein mentioned, and the land taken in exchange shall be held and assured (as nearly as may be) to the same uses and upon the same \* trusts and subject to the same powers and provisions (if \* 90 any), to, upon, and subject to which the land given in exchange was held; and the committee of the estate may and shall, in the name and on behalf of the lunatic, execute and do all such conveyances and things for effectuating this present provision as the Lord Chancellor, intrusted as aforesaid, shall order."

The causes in which the partition had been directed came on for hearing, on further consideration, on the 9th of December,

1857, when the Vice-Chancellor STUART ordered that certain hereditaments, described in the first, second, and third parts of the schedule to the chief clerk's certificate, should be conveyed in severalty to the uses of the parties in the certificate mentioned, their heirs and assigns respectively for ever; and that certain other hereditaments, comprised in the fourth part of the schedule, should be conveyed to, for, and upon such uses, trusts, intents, and purposes as at the date of such conveyance should be subsisting of the undivided part of which the petitioner was then seised for an estate in fee tail in possession, with divers remainders over, as mentioned in the pleadings; and that proper conveyances should be executed by all proper parties for the purposes aforesaid, such conveyances to be settled by the Judge; and after certain specific orders with reference to the deeds and writings relating to all the said hereditaments, there was contained in the decree a declaration that the petitioner was a trustee within the meaning of the Trustee Act, 1850, of the estate and interest which was vested in her in the hereditaments comprised in the first, second, and third parts of the schedule.

The prayer of the petition was, that all the estate and interest of the lunatic in the said hereditaments and premises comprised in the decree or order of the 9th of December, 1857,  
\* 91 might, for the purposes of such partition as was thereby ordered, be vested by the order of the Court in the committee of the estate and his heirs, and that he might be authorized to execute and do all such conveyances and things for effectuating such partition as to the Court should seem meet; and that in case it should appear that the partition would be for the petitioner's benefit, it might be ordered under the provisions of the Lunacy Regulation Act that the committee should in the name of the lunatic, and in her behalf, concur in the partition as aforesaid, and also in her name and on her behalf as aforesaid execute and do all such conveyances and things for effectuating such partition as his Lordship should order.

*Mr. Purcell* supported the petition.

*Mr. Craig* appeared for the committee of the estate, and stated that in the opinion of the committee of the estate the partition was for the benefit of the lunatic.

Their Lordships, after expressing some doubt whether the case was reached by the Trustee Act, 1850, said that the best course would be to make an order under both Acts on the committee of the estate, by his counsel, expressing his opinion that the partition was for the benefit of the lunatic, and consenting to convey the estate and interest of the lunatic so as to give effect to the partition. The order to declare that it appeared for the benefit of the lunatic to carry into effect the partition, and to direct the committee of the estate to convey accordingly.

## \* ALTREE v. SHERWIN.

## \* 92

1858. January 12. Before the LORDS JUSTICES.

A special examiner will not be appointed for the examination of witnesses in the country, merely on the ground that they reside in a neighbourhood distant more than twenty miles from London.<sup>1</sup>

THIS was an appeal by the plaintiff from a decision of the Master of the Rolls, refusing to appoint a special examiner to cross-examine at Walsall witnesses resident in the neighbourhood of that town.

The affidavit of the plaintiff's solicitor, which was the only affidavit in support of the application, stated that the suit was for the specific performance of a contract for the sale of a small property for the sum of 125*l.*; that the defendant had filed thirteen affidavits in opposition, and that the deponent was of opinion that it was necessary to cross-examine, on behalf of the plaintiff, the persons who had made them. The deponent then proceeded to specify the eleven persons who had made the affidavits, giving their places of residence, and the distances from London and from Walsall. It appeared that there was not any witness who resided at a distance of less than 118 miles from London, or at more than 36 miles from Walsall. The deponent went on to say, that, if the

<sup>1</sup> See 1 Dan. Ch. Pr. (4th Am. ed.) 905.

cross-examination took place at Walsall, he could conduct the cross-examination himself, or by means of his managing clerk, but that if it took place in London he must instruct counsel ; and that in addition to the annoyance to the witnesses of having to attend in London, and the expense of their maintenance and loss of time, it would, in the mere question of railway travelling, be nearly three times as expensive to cross-examine the witnesses in London as before an examiner resident in their own neighbourhood.

\* 93 \* The Master of the Rolls refused the application without hearing the defendant, who did not appear. The application was now renewed before the Lords Justices.

*Mr. L. Mackeson*, for the application, referred to *Reed v. Prest*, (a) and contended that that case ought to be followed rather than *Brocas v. Lloyd*. (b)

*Mr. C. T. Simpson*, for the defendant, was not called upon.

THE LORD JUSTICE TURNER.—I am of opinion that this is not a case in which we ought to disturb the order of the Master of the Rolls. There are no special circumstances in the case. If we were in this case to do what is asked, I do not see how we could refuse to do it in every case in which the witnesses reside in a neighbourhood beyond twenty miles from London.

The Lord Justice KNIGHT BRUCE concurred.

The application accordingly was refused with costs.

(a) Kay, App. xiv.

(b) 21 Beav. 519.

[ 74 ]

## \* STACEY v. SPRATLEY.

\* 94

1858. January 14. Before the LORDS JUSTICES.

The fact that the validity of a will of real and personal estate executed since the passing of the Wills Act (7 Will. 4 & 1 Vict. c. 26), has been established before the judicial committee as regards the personal estate, in a proceeding to which the heir-at-law was a party in another capacity, does not take away his right to an issue *devisavit vel non*.

THE question in this appeal was, whether the defendant Mrs. Handley was entitled to an issue *devisavit vel non*.

The object of the suit was to administer the real and personal estates of John Eldridge and Lucy Eldridge. John Eldridge died in 1821, leaving a will, by which he appointed his wife Lucy Eldridge his executrix, and devised and bequeathed to her all his property, real and personal, with a direction that she should devise it, on her decease, to his four children as she should think proper. Two of these children were the defendants Mrs. Handley and Thomas Eldridge.

Lucy Eldridge died on 14th August, 1854, leaving a will, by which she gave her property, real and personal, to Thomas Eldridge and Mrs. Handley in equal shares, and appointed them and the defendant Spratley her executors.

Thomas Eldridge died on 25th September, 1854, leaving a will, by which he gave all his real and personal estate to the plaintiff, whom he appointed his sole executor. The plaintiff filed this bill against Spratley and Mrs. Handley and her husband to obtain the share of Thomas Eldridge in the property of John Eldridge and Lucy Eldridge. The validity of the will of Thomas Eldridge as to personal estate was disputed, but was finally established by the decision of the judicial committee \* in a proceeding to \* 95 which Mrs. Handley was a party as one of the next of kin. Being also his heiress-at-law, she applied, in the present suit, for an issue *devisavit vel non*, which was refused by Vice-Chancellor STUART, and from that decision the present appeal was brought.

Mr. Bacon and Mr. Godfrey, for the heiress-at-law, claimed an issue *devisavit vel non* as a matter of right.

*Mr. Malins* and *Mr. Hislop Clarke*, for the plaintiff.—The Court has a discretion as to granting an issue. *Man v. Ricketts.* (a) We admit that a very strong case is required to induce the Court to refuse the heir-at-law an opportunity of having the validity of a will tried before a jury; but here there is a strong case. In *Man v. Ricketts* the issue was refused on the ground of lapse of time; here the establishment of the will as a will of personality, before the judicial committee, makes quite as strong a case against the heiress-at-law. She elected to go before that tribunal; if she wished to contest the will at law, she should have done so at once, instead of taking us before one Court after another. This is not like a suit to establish the validity of the will of Thomas Eldridge, or even to carry out the trusts of it; the will only comes in, as it were, incidentally, and the rule that an issue is a matter of strict right ought not to extend to such a case.

A reply was not called for.

THE LORD JUSTICE TURNER.—I am of opinion that we are \* 96 bound to direct an issue \* in this case. It has for years been a settled rule, that an heir-at-law has a right to have the validity of a will, which devises real estate away from him, tried at law;<sup>1</sup> and although the formalities required for the due execution of a will are now the same as to real and personal estate, we cannot, I think, depart from the settled rule, because the validity of the will, as a disposition of personal estate, has been conclusively established. In *Man v. Ricketts*, (b) the heir-at-law was named by the will a trustee, and he had acted as such for thirty years. He had thus raised by his acts an equity against himself, which was set off against his right to an issue. I cannot go so far as to say, that the mere fact of the will having been established as to personal estate, though in a proceeding to which the heiress-at-law was a party in another capacity, can be set off in the same way.

The Lord Justice KNIGHT BRUCE concurred.

(a) 7 Beav. 93, 101.

(b) 7 Beav. 93.

<sup>1</sup> See 2 Dan. Ch. Pr. (4th Am. ed.) 1072, 1074, 1075.

## \* ALDERSON v. WHITE.

\* 97

1858. January 12, 13, 14. Before the Lord Chancellor Lord CRANWORTH.

A. conveyed a life-estate to B. in consideration of 4739*l.* By a deed of even date B. contracted that if A. should at any time desire to repurchase the life-estate for 4739*l.*, B. would reconvey it to him for that sum. All the expenses of this transaction were paid by A. B. took possession, insured A.'s life for 4739*l.*, and after payment of premiums, the surplus rent was between 6*l.* and 6*l.* 10*s.* per cent on the purchase-money. B. left a will, by which he spoke of the life-estate as redeemable on payment of 4739*l.* and interest, and spoke of his interest as a security. A., after a lapse of nearly thirty years, and many years after the death of the solicitor who conducted the transaction, filed a bill to redeem, and failed in proving by direct evidence that the parties intended a mortgage.

*Held*, reversing the decision of the Court below, that the transaction was to be treated as a conditional sale, and not as a mortgage, and that A. had no right to an account of rents and profits.<sup>1</sup>

*Sembles*, that his right to repurchase on the payment of the full sum of 4739*l.* was not barred by the Statute of Limitations.

Whether the Statute of Limitations was not an answer to the claim to redeem on the footing of the transaction being a mortgage, *quære*.

*Held*, that if the transaction, considered as a purchase, had been so grossly oppressive, that the Court would on that ground have treated it as intended to be a mortgage, the right to have it so treated would not have been enforced after such a lapse of time and after the death of the other parties concerned in the transaction.

<sup>1</sup> In Massachusetts, a deed of land and a bond back of the same date, from the grantee to the grantor, conditioned to reconvey the estate upon payment of a certain sum of money, or upon the performance of some other condition, constitutes a mortgage, and the grantee is but a mortgagee. *Erskine v. Townsend*, 2 Mass. 493; *Taylor v. Weld*, 5 Mass. 109; *Carey v. Rawson*, 8 Mass. 159; *Graves v. Graves*, 6 Gray, 391; *Murphy v. Calley*, 1 Allen, 107; *Flagg v. Mann*, 14 Pick. 467, 479; *Bailey v. Bailey*, 5 Gray, 505; *Harrison v. Phillips*, 12 Mass. 456. To constitute a mortgage, it is not necessary that a bond of defeasance from the grantee to the grantor should bear the same date as the deed, if the two are executed and delivered at the same time, and intended to be one transaction. *Harrison v. Phillips*, *ubi supra*; *Newhall v. Burt*, 7 Pick, 157. And so, if after the making of such a bond, a deed has been given in accordance with its terms, and afterwards the premises are reconveyed to the obligor, and it is agreed that the same bond shall continue in force for the same purpose, this will amount to a redelivery of the bond, and make the transaction a mortgage. *McIntire v. Shaw*, 6 Allen, 83. The surrender and destruction of the bond at the end of the time fixed for redemption, and taking another for reconveyance

THIS was an appeal by the defendants from a decree of Vice-Chancellor STUART, giving the plaintiff liberty to redeem a life-interest in an estate called the Cumberwood estate, on the footing that a transaction of 1825 was to be treated as a mortgage, and not as an absolute sale subject only to a right of repurchase.

In 1825 David Newman was entitled for life to the Cumberwood estate, part of which was freehold, and the rest renewable leasehold for years determinable on lives. By indentures of lease and release, dated 29th and 30th July, 1825, in consideration of 4739 $\frac{1}{2}$ . he conveyed all his interest to John Crump, in terms purporting an absolute conveyance of his life-interest. There was nothing peculiar in the form of this deed, and it is therefore considered unnecessary to state it more in detail. On the same 30th July

\* 98 another indenture between Crump and Newman was executed. This deed recited a contract by \* Newman to sell to

Crump his life-interest in the Cumberwood estate, and the above conveyance, and that it had been agreed that in case Newman should be desirous to repurchase the premises at or upon the 25th of March in any year, at the sum of 4739 $\frac{1}{2}$ ., and should give a year's previous notice in writing to Crump, his heirs, executors,

upon different terms and an additional consideration, will be construed a surrender of all claim as mortgagor. *Falis v. Conway Mut. Fire Ins. Co.*, 7 Allen, 46. It is said by Chancellor KENT that in equity the character of the conveyance is determined by the clear and certain intention of the parties; and any agreement in the deed, or in a separate instrument, showing that the parties intended that the conveyance should operate as a security for the repayment of money, will make it such, and give to the mortgagor the right of redemption. 4 Kent (11th ed.), 142. See *Hicks v. Hicks*, 7 Gill & J. 75; *Kelly v. Thompson*, 7 Watts, 401; *Holmes v. Grant*, 8 Paige, 243; *Jackson v. Ford*, 40 Maine, 381; *Rogan v. Walker*, 1 Wis. 527; *Wyman v. Babcock*, 2 Curtis C. C., 386; *Woodward v. Pickett*, 8 Gray, 617; *Rich v. Doane*, 35 Vt. 125; *Lodge v. Turnerman*, 24 Cal. 385; *Crassen v. Swoveland*, 22 Ind. 427; *Luch's App.*, 44 Penn. St. 519; *Sweetser v. Jones*, 35 Vt. 317; 2 Story Eq. Jur. § 1018 b, 2 Dart V. & P. (4th Eng. ed.) 752, 753; 1 Sugden V. & P. (8th Am. ed.) 199. When it is once ascertained that the conveyance is to be considered and treated as a mortgage, then all the consequences appertaining in equity to a mortgage are strictly observed, and the right of redemption is regarded as an inseparable incident. 4 Kent, 143; *Jacques v. Weeks*, 7 Watts, 261; *Wright v. Bates*, 13 Vt. 341. The right of redemption may be barred by length of time. The analogy between the right in equity to redeem and the right of entry at law is generally preserved. 4 Kent, 186, 187; *Calkins v. Isbell*, 20 N. Y. 147; *Stansfield v. Hobson*, 3 De G., M., & G. 620. The mortgagee may equally, on his part, be barred by lapse of time. 4 Kent, 189.

administrators, and assigns, and at the expiration of such notice should pay to Crump, his heirs, &c., the said sum of 4739*l.* as the purchase-money for the said estate, then Crump, his heirs, &c., should accept the sum of 4739*l.* as and for the repurchase of the estate, together with such sums as he should pay for landlord's repairs or renewing the leasehold part of the estate, and should thereupon execute a conveyance to Newman accordingly. The operative part of this deed was a covenant by Crump to the effect of the contract expressed in the last recital, and need not be set out. The expenses incident to the preparation and execution of these deeds were paid out of the 4739*l.*

It appeared that Newman, at the time of this transaction, was about twenty-six years of age, and in embarrassed circumstances, having granted annuities which nearly absorbed the income of his property. He first applied to Crump for a loan of 4739*l.* to enable him to repurchase these annuities, and his evidence was positive that Crump assented to this, and that he himself always understood the transaction to be a mortgage transaction. Crump's representatives, on the other hand, alleged that Crump refused to lend that sum, but agreed to give it as the consideration for the absolute purchase of the life-interest. The annuities were repurchased out of that sum, and the estate thus freed from incumbrances. Crump entered into receipt of the rent of the property, which at that time was let for 410*l.* a year, and afterwards for more, the average rent being about 426*l.* In August, 1825, and \* June, 1826, Crump effected two policies on the life of \* 99 Newman for 2000*l.* and 2730*l.* It was alleged in the bill that these policies were effected under an arrangement with Newman and at his expense, but the plaintiff failed to prove this.

In 1842 Crump made his will, which, after various dispositions not relating to this property, proceeded as follows: "Then, as to the estate called Cumberwood, situate, &c., which is conveyed to me for the term of David Newman's life, subject to redemption on payment to me of the sum of 4739*l.* and interest, together with the sums that I may lay out thereon, I hereby give, devise, and bequeath the same estate to my said trustee, to hold the same to him, his heirs, and assigns, upon the same terms, trusts, and purposes upon which I now hold the same, until the same shall be redeemed or repurchased; and upon this further trust, that he,

my said trustee, do and shall from and out of the rents and proceeds of the said estate pay unto and allow my said son Edwin Crump for and during the term of his natural life the annual or yearly sum of 120*l.*, which I hereby direct shall be paid to him quarterly, and subject thereto, then I will and direct that the residue of such rents and profits, after payment of the annual premiums on the policies of insurance (which I require my trustee to keep on foot) accompanying the security on Cumberwood estate, shall be paid and divided unto and between my said sons Thomas Crump and John Francis Crump, their executors and assigns, in equal shares and proportions; and when and as soon as my said trustee shall be paid the said principal sum of 4739*l.*, together with the interest and such sums as will be due to me upon the estate, with the produce from the policies of insurance, then I do hereby direct that my said trustee do and shall stand possessed

\* 100 thereof upon the trusts following (that is to \* say)," [here followed trusts of 2500*l.*, which are immaterial for the present purpose]; "and as to the rest, residue, and remainder of the said sum of 4739*l.*, together with the interest and such other sums as will be paid to my said trustee on account of the said Cumberwood estate as aforesaid, I hereby will and direct that the same shall be paid," &c. The testator then directed 2000*l.* to be raised out of his residuary estate and paid to the trustees of his marriage settlement, and if his residuary estate should not be sufficient to raise that sum, then he directed that his trustee should retain and receive the interest arising from the Cumberwood estate till the said sum of 2000*l.* should be raised and made good to the trustees as aforesaid, and that his trustee should not be called upon to pay over the interest arising from the Cumberwood estate till the 2000*l.* should be paid.

The testator afterwards, in the same year, 1842, made a codicil, containing the following passage: "But when and as soon as my said trustee shall be paid the principal sum of 4739*l.* due and owing to me from the Cumberwood estate, together with such interest as shall be due thereon, and also the sums payable from the policies of insurance effected upon the said Cumberwood estate, together with all other moneys due and owing to me from the said Cumberwood estate, then I do hereby direct that my said trustee shall stand seised and possessed of the sum of 2000*l.* only, part

thereof, in trust for my said son Edwin Crump, instead of the sum of 2500*l.* as mentioned in my said will, upon the same trusts and purposes as in my said will is expressed and declared."

The testator died in 1847.

Newman, in January, 1827, took the benefit of the \* Acts \* 101 for the Relief of Insolvent Debtors, and was discharged from custody on 10th July, 1827. After this he served on Crump and Crump's devisee in trust a succession of notices, dated respectively 20th March, 1829, 11th March, 1835, 21st March, 1839, 21st March, 1840, and March, 1842, in each of which he gave notice of his intention to repurchase at the sum of 4739*l.* On 22d March, 1851, he served a notice to redeem on payment of the 4739*l.*, or so much thereof as should be due.

The plaintiff, who was the creditors' assignee under the above insolvency, filed the present bill in 1854 against Newman and the persons entitled under Crump, praying for a declaration that the plaintiff was entitled to redeem the estate and policies of insurance, for an account of what was due to Crump's executors for principal and interest, for an account of rents on the footing of wilful neglect and default, and with rests, and for redemption according to the result of such account.

Chadborn, the solicitor who conducted the transaction, died in the year 1839, and the only direct evidence as to what took place at the time was that of Newman himself. A witness named Packwood, however, deposed that in 1826 he had visited Newman in prison, and during his conference with him had asked him why he had not mortgaged his life-interest instead of selling it, and that Newman had answered that Crump would not advance him money by way of mortgage.

It appeared that on an average the net surplus of the rent of the estate, after keeping on foot the policies, amounted to a little more than 6*l.* per cent on the 4739*l.*

The cause was heard before Vice-Chancellor STUART, who made a decree declaring the plaintiff entitled to \* redeem \* 102 upon the terms of payment of the sum of 4739*l.* An account was directed of what Crump and his executors had laid out in repairs and improvements, and it was ordered that the amount should be added to the 4739*l.*, and interest at 5*l.* per cent on the latter sum. An account was directed of what had been received by Crump and his representatives for rents, and it was

ordered that the amount should be set off against the amount of the 4739*l.*, interest and repairs, and the balance be certified. Further consideration was adjourned. Crump's representatives appealed against this decree.

*Mr. Malins* and *Mr. Rogers*, in support of the decree.— It is evident on the face of the transaction that a mortgage was intended ; a stipulation for the repurchase of a life-interest at the same sum, whatever time may have elapsed, is absurd. That Newman paid the costs is important evidence that a mortgage was intended. *Williams v. Owen.* (*a*) *Talbot v. Braddill* (*b*) is in our favour, and *Fulthrope v. Foster* (*c*) is almost identical with the present case. In *Lawley v. Hooper* (*d*) the decision proceeded on grounds which exist here ; the estate was a life-estate, the price named for repurchase was constant, and the bargain treating the transaction as a sale was so hard that it could not be allowed to stand. Newman, if represented by a solicitor, would not have been allowed to make such a bargain as this, supposing it a sale, would be. Newman's own evidence is clear as to a mortgage being intended, and Packwood's evidence in opposition is not to be relied on. Moreover, the language of Crump's will is decisive

to show that he looked upon the transaction as a mortgage.

\* 103 *Sevier v. Greenway* (*e*) was \* decided on a similar ground.

The Statute of Limitations cannot apply where the contract is, in terms, for redemption at any time during the life of the borrower. The decree should be varied by directing an account with rests, as in *Lawley v. Hooper* and *Sevier v. Greenway*, there being a large surplus rent and no interest in arrear when the mortgagee took possession.

[In reply to a question from the Court, *Mr. Malins* stated, that the plaintiff did not wish to redeem, if he could only do so on payment of the whole 4739*l.*.]

*Mr. Wigram* and *Mr. Faber*, for Crump's representatives.— The bill is singularly framed, in not asking the Court to rectify

- (*a*) 5 M & C. 303.  
 (*b*) 1 Vern. 183.  
 (*c*) 1 Vern. 476.

- (*d*) 3 Atk. 278.  
 (*e*) 19 Ves. 413.

the instruments, while it seeks to give them an effect contrary to their clear terms. We need not, however, press this technical objection. We say, first — that the plaintiff has not proved his case. He relies first on the amount of the income. The income was such as to give Crump not much above 6*l.* per cent clear, after paying premiums, so he did not get a particularly good bargain. There is some evidence that the life-interest was worth 6000*l.*, but it is of a most unsatisfactory character. As to the direct evidence of Newman, it is wholly worthless. He treated the transaction as a sale till Crump and Chadborn were dead, and the notices given by him prove conclusively that he understood it as such. This and Packwood's evidence nullify his testimony: moreover he is a man unworthy of credit, having been convicted and imprisoned for an indecent assault of an infamous description. Then the plaintiff relies on the facts that the expenses of the transaction were paid by Newman, and that the price for repurchase was fixed. There is nothing in either circumstance. The transaction was in substance a sale of a life annuity, and in annuity transactions the grantor generally pays the expenses; \* and if there is a proviso for repurchase, it is at a fixed sum, not diminishing with the lapse of time. Had the estate been a fee-simple, it would have been more difficult to suppose the transaction a conditional sale, for nobody would buy a fee-simple subject to such a proviso so unlimited as to time. Then as to the language of Crump's will, it was evidently drawn by a lawyer who did not know much about the transaction, and is not very accurate: but it cannot be inferred from it that Crump looked on the transaction as a mortgage; had he done so, he would have bequeathed the money, not disposed of the rents till repurchase. In *Sevier v. Greenway*, (a) so much relied on by the plaintiff, the acknowledgment that the transaction was a mortgage was in a deed to which both grantor and grantees were parties, which makes that case no authority on the present.

Then we rely on the Statute of Limitations and lapse of time.

[THE LORD CHANCELLOR.— Does not the special form of the proviso for redemption take the case out of 3 & 4 Will. 4, c. 27, § 28 ?]

(a) 19 Ves. 412.

[ 83 ]

That might be so if the plaintiff were seeking to repurchase at 4739*l.*, but he does not wish that ; his case is that the deeds ought to be reformed and turned into a common mortgage deed. If the deed had been a common mortgage deed, the plaintiff would have lost, by lapse of time, all right to redeem, and he cannot treat the special proviso for redemption as valid so far as it helps him, invalid so far as it is against him. His equity (if any such there ever was) to have the deed reformed is barred by lapse of time.

*Hovenden v. Lord Annesley*, (a) *Beckford v. Wade*, (b) *Gregory v. Gregory*, (c) *Roberts v. Tunstall*, (d) *Baker v. Read*, (e) \* *Chadwick v. Broadwood*, (g) *Tull v. Owen*. (h)

\* 105 The plaintiff has no claim on the policies. *Gottlieb v. Cranch*. (i)

*Mr. Malins*, in reply.—It is said that in an annuity transaction, the price for repurchase is always a constant sum ; but if the grantor is properly advised, he always has the policies included in his repurchase.

THE LORD CHANCELLOR.—The question in this case is whether the transaction of 1825 was a mortgage or not. The first of the deeds then executed purports to be an absolute conveyance. By the deed of even date, it was stipulated that if Newman should be desirous of repurchasing the estate, he should be at liberty to do so on the terms therein mentioned. [His Lordship here read the material parts of the deed providing for repurchase.] These deeds taken together do not, on the face of them, constitute a mortgage, and the only question is whether, assuming the transaction to be a legal one, it has been shown to be in truth such as in the view of a Court of Equity ought to be treated as a mortgage transaction. The rule of law on this subject is one dictated by common sense ; that *prima facie* an absolute conveyance, containing nothing to show that the relation of debtor and creditor is to exist between the parties, does not cease to be an absolute conveyance and become a mortgage merely because the vendor stipulates

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| (a) 2 Sch. & Lef. 636. | (e) 18 Beav. 398.          |
| (b) 17 Ves. 87.        | (g) 3 Beav. 308.           |
| (c) G. Coop. 201.      | (h) 4 Y. & C. 192.         |
| (d) 4 Hare, 257.       | (i) 4 De G., M., & G. 440. |

that he shall have a right to repurchase. In every such case the question is what, upon a fair construction, is the meaning of the instruments? Here \* the first instrument was, on \* 106 the face of it, an absolute conveyance; the second gave a right to repurchase on payment not of what should be due, but of the full amount of the purchase-money of 4739*l.* Was that, if taken according to its terms, a lawful contract? Clearly so. What, then, is there to show that it was intended to be a mere mortgage? I think that the Court, after a lapse of thirty years, ought to require cogent evidence to induce it to hold that an instrument is not what it purports to be, and I see but little evidence to that effect here. Newman, in 1825, was a young man in embarrassed circumstances, and had granted annuities which nearly exhausted the income of his property. He applied to Crump to advance him money on the security of his life-interest. The defendant's case is, that Crump refused, but consented to purchase the life-interest subject to a right of repurchase. Was it improbable that Newman should agree to these terms? I cannot see that it was. It has been urged that he got nothing, but he might well think that it was better for him to get rid of the estate than to have it subject to the claims of the annuitants. Such an idea would not be unreasonable, and the language of the deeds is so clear that something very strong would be required to show that they did not express what the parties intended. It is said, however, that there are other circumstances showing that they did not. First, there is Newman's direct testimony. The credibility of his evidence has been impeached on account of the disgusting transactions to which I need not more particularly allude, but I think it right to say that such conduct does not, in my opinion, render him wholly unworthy of credit on a point like the present. When, however, I look at his evidence, along with the other evidence in the cause, I think that the result is in favour of the view that the deeds express what they were intended to express.

Packwood's testimony \* is positive. It has been said that \* 107 it cannot be supposed that after such a length of time he really remembers all the details to which he deposes, but his evidence has not been impeached, and the plaintiff has not cross-examined him. On the other hand, what Newman says is inconsistent with his own acts for many years. It is true that the plaintiff is not bound by any acts done by Newman after his

insolvency, but that consideration does not at all remove the prejudice to Newman's evidence, which arises from the fact that while he still considered himself to be interested, he gave notices of his desire to repurchase on payment of the full sum of 4739*l.* I think, therefore, that the evidence of Packwood, being supported by the deeds and by Newman's own conduct, must be treated as more credible than that of Newman.

Much stress was laid on the fact that the costs of the transaction were paid wholly by Newman, which, it was said, would be the case in a mortgage, but not on a sale. After a lapse of thirty years, it is not to be expected that a point of this kind should be quite satisfactorily explained. I do not, however, see any reason for supposing that it is incapable of explanation. A special stipulation that the expenses shall all be paid by the vendor, is not, I believe, very unusual in transactions between persons in the lower ranks. Much weight is also due to Mr. Wigram's observation, that this was in substance an annuity transaction, and that if it had been one in form, it would have been in the ordinary course that Newman should pay the costs.

The point most relied on by the respondents was that the expressions used in Crump's will, made in 1842, were inconsistent with his being any thing else than a mortgagee. Now, con-

\* 108 sidering that Crump was not \* a solicitor, but a yeoman, I think that, on a question of this kind, but little attention is to be paid to the precise form of what he is made to say in a will drawn for him. I think, however, that his expressions are hardly to be called inaccurate, as applied to property which he had purchased, subject to a right of repurchase. The use of the word "interest" was much relied on, but a solicitor drawing the will, and not knowing all about the facts might put in the word "interest" as a matter of course; and it is to be observed that the testator disposes of the "rents and profits" of the estate in a way inconsistent with the notion that he was receiving them only as a mortgagee in possession. It is true he speaks of his "security" on the estate, but I do not see in this any material inaccuracy, he might well regard it as a security, but the question is whether he shows that he regarded it otherwise than as a security which entitled him absolutely to the rents and profits till the repurchase. I think that still less weight is due to the expressions in the codicil. I agree with the observations of Lord MANNERS in *Goodman v.*

*Grierson*, (a) and I think that the Court ought not to cut down the rights of the purchaser unless it can see its way clearly to his having the rights of a creditor. Now, in this case, in what position would Crump have been, had Newman died a few days after the transaction?

These observations dispose of the case, but several other matters have been adverted to, as to which I think it right to state my impression.

It was argued that the transaction, if treated as a purchase, was a case of a most oppressive bargain. It would be a sufficient answer to this to say that the bill \* contains no specific allegations to that effect, and that the prayer does not point at relief on this ground. I do not, however, think that the bargain can, *prima facie*, be called oppressive. The surplus of the rents, after keeping alive the policies, was of such an amount that Crump, with a great deal of trouble and some risk, would get 6*l.* 6*s.* 8*d.* per cent. This *prima facie* does not appear excessive. In *Fulthrope v. Foster* (b) the interest was 4*l.* 10*s.*, and the rent of the estate (which was not, as here, an estate for life, but an estate in fee-simple) was 13*l.* This would have made the bargain, if treated as a purchase, so grossly oppressive, that the Court said it must be held to have been intended as a mortgage. Had it, however, been clearly shown, in the present case, that the transaction, if a purchase, was most oppressive, I think that it would be impossible for the Court now to set it aside after a lapse of nearly thirty years, fifteen years after the death of the purchaser, and nearly twenty years after that of the solicitor who managed it.

The view which I have taken of the case renders it unnecessary to decide the question on the Statute of Limitations, which appears to me one of some nicety and difficulty. I am disposed to think that the statute cannot apply so as to make the mere possession by the mortgagee for twenty years without acknowledgment a bar to redemption, where the original contract is, in terms, that the mortgagor may redeem at any time during a period extending beyond the twenty years; but that does not dispose of the question, whether the statute would not bar any such right as is claimed here to redeem on terms different from those expressed in the deed.

\* 110

## \* LEUTY v. HILLAS.

1858. January 16, 18. Before the Lord Chancellor Lord CRANWORTH.

Particulars of sale described Lot 5 as consisting of a leasehold house, No. 20, of a certain description, with a yard, at the end of which was a coach-house and stable, and small yard beyond, with extra stable; and stated, that the house was occupied by W., the yard, coach-house, &c., by H. Lot 6 was described as a leasehold house, "No. 21, adjoining Lot 5, and of similar design and accommodation. Is now and has been for years in the occupation of T." The two houses were built on adjoining strips of land, each held under a separate lease. The small yard and extra stable lay behind No. 21, and were comprised in the lease of Lot 6. The occupations were as stated in the particulars. The plaintiff purchased Lot 5, the defendant H. Lot 6. The plaintiff took an assignment from the vendor of the property in the lease of Lot 5, and no more. H., on the following day, took an assignment of all the property comprised in the lease of Lot 6, thus obtaining the legal estate in the small yard and extra stable.

*Held*, that the plaintiff was entitled to an assignment from H. of the small yard and extra stable, for that, according to the true construction of the particulars, H. had not contracted to purchase them, but the plaintiff had.<sup>1</sup>

*Held*, that the vendor was not a proper party to the suit.

THIS was an appeal by the plaintiff from a decree of the Master of the Rolls, dismissing the bill with costs as against both defendants.

The bill was filed to obtain from the defendant Hillas an assignment of a small leasehold yard, larder and stable, which had been included in an assignment to Hillas of a leasehold house, No. 21, Inverness Road, purchased at an auction from the defendant Wild, the plaintiff's case being that they formed part of a lot comprising No. 20, Inverness Road, purchased by the plaintiff at the same

<sup>1</sup> See 1 Sugden V. & P. (8th Am. ed.) 326; Kerr Inj. 54. Where the proposed reformation of a deed involves the specific enforcement of an oral agreement within the Statute of Frauds, or, when the term sought to be added would so modify the instrument as to make it operate to convey an interest or secure a right which can only be conveyed or secured through an instrument in writing, and for which no writing has ever existed, the Statute of Frauds is a sufficient answer to such a proceeding; unless the plea of the statute can be met by some ground of estoppel, to deprive the party of the right to set it up. Glass v. Hulbert, 102 Mass. 31; Jordan v. Sawkins, 1 Ves. Jr. 402; Osborn v. Phelps, 19 Conn. 63; Clinan v. Cooke, 1 Sch. & Lef. 22; see 1 Sugden V. & P. (8th Am. ed.) 160, n. (r).

auction, and had been erroneously omitted from his conveyance, and that the defendant Hillas had taken with notice of the plaintiff's rights.

The sale in question took place in May, 1856. In the title-page of the particulars, along with a general description of various other property, was the following: "Nos. 20, 21, 22, Inverness Road, with stabling, coach-house, &c. in the rear." In the 4th condition, which provided for the commencement of the title, was the following stipulation: "That, as regards Lots 5, 6, 7, and 9 respectively, such abstract shall commence with the \* leases \* 111 under which the same lots are respectively held." The descriptions of Lots 5 and 6 in the particulars were as follows:—

"Lot V. A convenient and well-arranged dwelling-house, No. 20, Inverness Road, with wing at side extending over gateway. It is brick built, with stuccoed front and slated roof, has a fore-court inclosed with iron palisade front on stone curb, and contains: [Here followed particulars of the rooms in the house.] "At the side, with distinct entrance by carriage gates, is a yard, with shed under the wing of dwelling, and back coach-yard, at end of which is a brick building, of coach-house, two-stall stable, with two rooms above, small yard beyond, with loose box or extra stable. The residence is let to Mrs. Watson, by agreement for three years from Lady-Day, 1854, at 65*l.* per annum. The yard, coach-house, &c., are let to Mr. Hawkins, fruiterer, &c., a yearly tenant, at 23*l.* per annum. The foregoing is held by lease for a term of ninety-five years and a half from Christmas, 1843, at a rent of only 2*l.*"

The description of Lot 6, which was contained in the same page of the particulars, was as follows:—

"Lot. VI. A leasehold private residence, No. 21, Inverness Road, adjoining Lot 5, and of similar design and accommodation, with the deficiency of the wing. Is now and has been for years past in the tenure of Mrs. Trulock, a yearly tenant, at 55*l.* per annum; and held by lease for a term of ninety-five and a half years from Christmas, 1843, at a ground rent of 7*l.* 10*s.*"

The houses No. 20 and No. 21 were built upon adjoining strips

of land of equal depth, which were demised by separate  
\* 112 building leases for terms of ninety-five and a \* half years from Christmas, 1843. Each lease contained a ground plan. The houses were similar in design, except that No. 20 had a wing extending over a carriage-way leading to the rear of the house, along the side furthest from No. 21. A few years before the sale, Mr. Street (the gentleman of whose will the vendor was trustee), being entitled to both houses and residing in No. 20, separated the back part of the land on which No. 21 stood from the rest of the premises, so as to make it inaccessible from No. 21. Upon this piece of ground he built a larder attached to No. 20, and adjoining that attached to No. 21, and a small loose box or extra stable, keeping the part not built on as a small separate yard. There was an approach to these premises from the adjoining part of the yard of No. 20, the only way of getting to which was by the carriage-way belonging to No. 20. No. 21 retained a paved yard, situate at the back of the house, lying between it and the two larders. Mr. Street for some time occupied No. 20, with the above additional premises. After he ceased to reside there, the loose box and small yard, with the stable and coach-house originally belonging to No. 20, were let to a separate tenant, and at the time of the sale they were let to Hawkins, as mentioned in the particulars. Mrs. Trulock occupied No. 21, with the paved yard at the back of it and a larder. The property in the occupation of Mrs. Watson comprised the larder built upon the land in the second lease, and all such parts of the premises in the first lease as were not let to Hawkins.

The plaintiff being desirous of bidding for Lot 5, went over both it and Lot 6, and ascertained from Mrs. Trulock and Hawkins the extent of what they respectively occupied. At the sale he bought Lot 5, and the defendant Hillas Lot 6. In the auction room the plaintiff asked the auctioneer, in the hearing of Hillas,  
\* 113 whether \* the larder of Lot 6 was sold with Lot 5, as it appeared to be included in the description of that lot, to which the auctioneer replied that he sold the property as described in the particulars. The plaintiff completed his purchase on 23d June, taking an assignment from Wild of the premises comprised in the first lease, so that he did not obtain the legal estate in the premises taken from the back of the land in the second lease. The defendant Hillas completed his purchase on 24th June, taking

an assignment of all the premises comprised in the second lease, so that he obtained the legal estate in the larder attached to No. 20, and in the loose box and small yard.

The plaintiff, soon after the completion of his purchase, commenced in the back premises of No. 20 alterations extending over the small yard and over the larder of No. 21. On 30th July, 1856, the solicitor of Hillas wrote to the plaintiff a letter complaining of the encroachment, and claiming a title to the whole of the premises in the second lease. The plaintiff then, for the first time, discovered the defect in his purchase deed. A long negotiation ensued, in the course of which the plaintiff, on 19th August, offered to take a lease of the disputed premises at a peppercorn rent, and pay the expenses of the lease and counterpart, or to take Hillas's purchase off his hands at a price covering Hillas's purchase-money, with interest and costs. Hillas positively declined to accept either proposal, and, after some further fruitless correspondence, the plaintiff filed his bill against Hillas and Wild, praying that Hillas might be decreed to assign the disputed parcel to the plaintiff or to underlet it to him at a peppercorn rent for the residue of the term, wanting ten days, or some other nominal period; that if the Court should not consider the plaintiff entitled to this relief against Hillas, then that he might be \*declared entitled at his own election to have compensation from Wild or to rescind the contract.

The defendant Hillas, by his answer, did not positively deny his having been over No. 21 before the sale, but it did not appear that he had. The account he gave was as follows: "Prior to my said purchase, and in or about the beginning of May, 1856, my attention having been called, as it was called, to the particulars of sale in the bill mentioned, and being, as I was, desirous of possessing one or two of the lots therein mentioned, I, in company with a friend of mine, went over and inspected some of such lots. The last of such lots which we so inspected was Lot 7, being No. 22, Inverness Road. On making such inspection as aforesaid, my said friend and myself considered that certain of the said lots were objectionable on account of the confined limits or extent of the back premises thereof; but on looking (as we did) at the said Lot 6, and observing (as we did), not only the said garden, but also the said larder, yard, and stable, all of which appeared to,

and as we concluded did, belong to and form the back premises of the said house No. 21, Inverness Road aforesaid, we felt that the said objection did not apply to such Lot 6, by reason of such back premises being (as we fully believed) included therein, and I determined to bid for the same, provided I found on inquiry at the office of Mr. W., the solicitor, to whose office I was by the said particulars of sale referred, that there was no difficulty in respect of the title or otherwise." The defendant went on to say that he applied to the solicitor in question, who stated to him that every thing was plain and straightforward, and that there was no difficulty about the title. He then continued: "Deeming, as I did, such statements and observations of the said Mr. W. satisfactory,

I determined to bid at the said sale for the said Lot 6.

\* 115 Accordingly I attended the said sale \* and bid for the same lot and became purchaser thereof, and I so bought the same in full belief that it included all the said premises at the back thereof (that is to say), the said larders, small yard, and extra stable or loose box, as well as the said paved yard; and in making my calculations as to the sum I would give for Lot 6, I took into consideration the value of all such back premises as being part thereof."

The cause came on for hearing before the Master of the Rolls, who dismissed the bill with costs. The plaintiff appealed.

*Mr. Selwyn, Mr. Amphlett, and Mr. E. R. Turner*, for the plaintiff.—If after a contract to sell to A. the vendor sells and conveys to B., who has notice, A. is entitled to a decree for specific performance as against B. *Potter v. Sanders.* (a) That is the present case. On looking at the particulars it is clear that we contracted for the property in dispute. Hillas must be taken to have had notice of this, for (1) the description of Lot 5, which is referred to in that of Lot 6, clearly includes the plot in question, while that of Lot 6 gave Hillas no right to suppose he was to have a stable. (2) The occupation of the property was as described in the particulars, and this plot was not in Mrs. Trulock's occupation. *Daniels v. Davison.* (b) (3) Inspection of Lot 6 would at once show that this plot was separated from it by a wall, with no door

(a) 6 Hare, 1.

(b) 16 Ves. 249; 17 Ves. 433.

in it. (4) The auctioneer, at the sale, in answer to an inquiry from the plaintiff, stated in the hearing of Mr. Hillas that the property the plaintiff was to have was Lot 5, as described in the particulars. Hillas evidently never thought about having this plot till a dispute about building over his \* larder led \* 116 him to look into his deeds. If conveyances had been executed describing the lots as they are described in the particulars, we should have obtained this parcel, whether Hillas's conveyance were prior or subsequent to ours, for the reference to occupation would confine him to what was occupied by Mrs. Trulock. *Doe v. Burt.* (a) If Lot 5 had still been in the hands of the vendor, we should have been entitled to a conveyance of this plot, as having been omitted by mistake from our conveyance. Sug. V. & P. 373, 11th ed., 271, 18th ed.

If we are not entitled to relief against Hillas, we are against Wild, who ought to make compensation. Sug. V. & P. 11th ed. 273, and cases there cited. *Edwards v. McLeay.* (b) At all events, he ought not to have costs, for his carelessness in framing the particulars has produced the whole mischief.

An objection was taken in the Court below to the alternative form of the prayer, but the frame of the bill is justified by *Daniels v. Davison*, *Potter v. Sanders*, (c) and *Spence v. Hogg*. (d) This suit is in the nature of a specific performance suit, and we were obliged to make Wild a party.

*Mr. Lloyd* and *Mr. Surrage*, for the defendant Hillas.—The plaintiff comes here on the ground of mistake: he must prove a common mistake, and that it was by mistake, and not in pursuance of a contract, that the disputed piece of land was assigned to Hillas. He must show, therefore, that Hillas had no right to consider it included in his contract. To establish this the plaintiff says, \* (1) that the particulars gave Hillas notice \* 117 that the disputed land was included in the plaintiff's purchase. Now, the description in the title-page of the particulars, "Nos. 20, 21, 22, Inverness Road, with stabling, coach-house, &c., at the rear," would lead a purchaser to believe that each house had stabling at the rear.

(a) 1 T. R. 701.

(b) G. Coop. 308; 1 Sw. 287.

(c) 6 Hare; 1.

(d) 1 Coll. 225.

[THE LORD CHANCELLOR.—I do not think that there is any thing in that. Those words are merely a general description of what is to be sold, and have no bearing on the question what a particular lot contained.]

Then the 4th condition amounts to a representation that each lot is held under one lease, so Hillas could not suppose that part of the property in his lease went with property held under another lease. Reading the description of Lot 5 would not lead Hillas to suppose this parcel included in it. The words "small yard and stable beyond" are inapplicable to premises lying not beyond the other parts of Lot 5, but at the back of Lot 6. Then the words "of similar design and accommodation," in the description of Lot 6, would lead Hillas to suppose that there was stabling to his lot. He swears positively that he considered himself to be purchasing the small yard and stable, and the particulars justified him in this. If Lot 5 had been bought in, the vendor could not have claimed the reassignment of this parcel, and the plaintiff cannot have any better right. Then (2) it was urged that an inspection of Lot 6 would have shown that this parcel was not included in it. It is not proved that Hillas did go over it, and he was not bound to do so. [Duke of Norfolk v. Worthy (a) was referred to.] Then, (3) as to occupation by tenants, we were not bound to ask questions of the tenants. The possession of a tenant is notice of his interest: Daniels v. Davison shows that, but it is not notice \* 118 of any thing more. Oxwith v. Plummer, (b) \* Sug. V. & P. 11th ed. 1055. The Court is here asked to extend the doctrine of constructive notice, which it is not inclined to do. Ware v. Lord Egmont. (c) (4) As to what was said by the auctioneer, the question only related to the larder, and the guarded answer which was given could not be notice of any thing not relating to it.

[The Lord Chancellor assented to this.]

The reference to occupation in the description of Lot 6 has not such an effect as the plaintiff contends. We do not dispute the

(a) 1 Campb. N. P. 337.

(b) Bac. Ab. Mortgage, E. 3; and 2 Vern. 635.

(c) 4 De G., M. & G. 460.

authority of the cases he relies on ; it hardly needs authority to establish that a grant of the lands in the occupation of A. B. passes nothing but what is occupied by him. But here there is a description of the property with a superadded reference to occupancy, which cannot control the parcels. It is a mere case of *falsa demonstratio*.

It would make our title completely bad to take from us a part of the property comprised in our lease, as we should be liable to forfeiture for the plaintiff's acts on the part taken away. If Lot 5 had remained unsold, the vendor could not have compelled us to take such a title ; how can this careless purchaser be in a better position ? He is the party in fault : had he used reasonable caution in preparing his purchase deed, the present litigation could never have arisen. We supposed we had bought this lot, and got a conveyance of it ; he supposed he had bought it, and by gross negligence failed to get a conveyance of it : had he got a conveyance of it, we, on finding that we could not, should have declined to complete, and there the matter would have ended.

\* *Mr. Follet* and *Mr. Speed*, for the vendor. — No relief \* 119 against Wild can be had on this bill. If the statements are true, the plaintiff is entitled to relief against Hillas, not against Wild : so the plaintiff is asking relief to which he can only be entitled if the statements in his bill are untrue. *Seddon v. Connell* (a) is in our favour on this, and our case is stronger. *Daniels v. Davison* and *Potter v. Sanders* do not support the case against Wild ; it was necessary, in those cases, to establish the right as against the third party. The plaintiff undertakes to prove a case entitling him to relief against Hillas, and by that he must stand or fall ; he cannot make such an alternative case as this. *Edwards v. Edwards*. (b)

*Edwards v. M'Leay* (c) turned on fraud, and is therefore wholly beside the question. The plaintiff says our negligence in framing the particulars caused the mischief, yet he says in the same breath that the particulars gave Hillas clear notice that he was not buying this parcel, and, if so, there was no negligence in framing them. There is, therefore, no case for rescinding ; neither is there any for compensation : that must be got (if at all) at law ; a

Court of Equity does not give it unless it has jurisdiction by reason of specific performance, and therefore cannot give it after conveyance. Sug. V. & P. 13th ed. 197-211, 440-443, *Thomas v. Powell*, (a) *Newham v. May*, (b) *Urmston v. Pate*, (c) referred to by Lord ROSSLYN in *Wakeman v. Duchess of Rutland*. (d) Even at law there is no remedy after completion, except in the \* 120 case of fraud. *Bree v. Holbech*. (e) In a suit for \* specific performance, the Court will not give compensation unless it decrees specific performance. *Todd v. Gee*, (g) *Sainsbury v. Jones*. (h)

The plaintiff says this is a bill to rectify a mistake: it may be so against Hillas, but not against Wild, for he cannot rectify it. Relief against Wild would work unfairly. If the contract be rescinded he gets back part of Lot 5, repaying the price of the whole; if compensation be decreed, he is made to pay money without the power of recovering it over.

*Mr. Amphlett*, in reply.

THE LORD CHANCELLOR.—I feel compelled to take a view of this case different from that taken by the Master of the Rolls. The first question is, what were the properties which the plaintiff and Mr. Hillas respectively contracted to purchase. There cannot be any doubt that the plaintiff contracted to purchase the whole of Lot 5, including the disputed parcel lying behind Lot 6; for though it may be true, as was so strongly urged, that the word "beyond" is not quite accurate, as a description of the locality of the ground on which the loose box or extra stable was built, still it is hardly to be described as inaccurate,—a person going on the property would see that there was no other yard,—and an inquiry from the occupiers, if made, would show that the disputed parcel was in the occupation of Hawkins the fruiterer. There is, therefore, no doubt that the plaintiff supposed this parcel to be included in his contract for purchase, and that on the fair construction of the particulars it was so included. What did \* Mr. Hillas contract to purchase? He swears positively that he

(a) 2 Cox, 394.

(b) 18 Price, 749.

(c) 4 Crui. Dig. 390, 4th ed.

(d) 3 Ves. 238, 235.

(e) Dougl. 654.

(g) 17 Ves. 273.

(h) 5 M. & C. 1.

believed himself to be contracting for the purchase of the whole of the premises comprised in the lease of Lot 6, including the part now in dispute. I will not suspect him of swearing untruly ; he might believe so, but did the particulars warrant such belief. All that the particulars give him is, "A leasehold private residence, No. 21, Inverness Road, adjoining Lot 5, and of similar"—"similar," not "the same"—"design and accommodation : is now, and has been for years past, in the tenure of Mrs. Trulock." The question has been entered into, whether he knew what was in the occupation of Mrs. Trulock. I think this is immaterial. What the vendor offered to sell him was the property in the tenure of Mrs. Trulock ; and, if he had inquired, he would have found out the fact that this yard was not in the tenure of Mrs. Trulock. He looked at the property from an adjoining house ; saw that it appeared to run back and to include the disputed parcel ; took it for granted that the whole was in the occupation of Mrs. Trulock, and bought under that impression ; but, in fact, the whole was not in her occupation, and he had no good reason for supposing that it was.

How then did matters stand immediately after the signing of the contracts ? The plaintiff was entitled to call for an assignment of the whole of Lot 5, including the yard at the back of Lot 6. Mr. Hillas had no title to any thing not in the occupation of Mrs. Trulock. If he had filed a bill for specific performance, claiming to have the disputed parcel as being part of Lot 6, the vendor would have had a good defence ; for according to the true construction of the contract, this parcel was not included in it. It may be, that if the vendor had filed a bill for specific performance against Hillas, not offering him the disputed parcel, Hillas would have had a good \* defence ; for the particular is so \* 122 framed as to lead a purchaser to believe that nothing beside Lot 6 was included in the lease of that lot. This appears to me to be the true effect of the reference to the lease ; it does not make the contract amount to a contract to sell the whole, whatever it may be, of the property comprised in the lease ; but it is a representation of the kind of title which the vendor is prepared to give, and it might fairly be construed by a purchaser as representing that the lot was held under a lease not comprising any thing else. On a similar ground, I think that the vendor probably could not have obtained a decree for specific performance against the present

plaintiff, since part of Lot 5 is comprised in the same lease with other property, and to that part the plaintiff will not get a good title, since he will be liable to be deprived of it by a forfeiture occasioned by the acts of other parties. This objection, however, would not lie in the mouth of the vendor; and I am of opinion, that at the time when the contract for Lot 6 was entered into, the plaintiff had a right to specific performance against the vendor as to the whole of the property comprised in Lot 5, including the disputed parcel. Mr. Hillas then entered into a contract for the purchase of Lot 6, not including the disputed parcel. He might think that his contract included it; but he had no right to think so, for the contract, according to its fair construction, extended to nothing but what was in the occupation of Mrs. Trulock. Having then by his assignment obtained more than what was included in his contract, he became merely a trustee of the excess, and the plaintiff is entitled to a decree against him. The decree must be with costs, considering the nature of the offer by the plaintiff, which Mr. Hillas refused. There will be no costs of the appeal.

I am of opinion that relief ought to have been asked  
\* 123 \* against Mr. Hillas alone, and that Mr. Wild was improp-  
erly made a party. As against him the appeal must be  
dismissed with costs. It is unnecessary for me to enter into the  
question, whether Mr. Hillas has any remedy against him.

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In the Matter of CATHERINE JOSEPHINE ARMSTRONG, a  
person of unsound mind.

1868. January 29. Before the Lord Chancellor Lord CRANWORTH and the  
LORDS JUSTICES.

A lady who had been found lunatic obtained leave to traverse, and no committee was appointed. Her husband, who had petitioned for the inquisition, having, before the trial of the traverse, become incapable of attending to business, the Court appointed interim committees of the lady's person, with liberty to take such proceedings with respect to the traverse as they should think fit.

ON 4th August, 1857, an order was made on the petition of Captain William Henry Armstrong, referring it to the Masters in lunacy to inquire as to the alleged lunacy of Catherine Josephine

Armstrong, the wife of Captain Armstrong. On 21st August, 1857, Mrs. Armstrong was found to be of unsound mind. On 2d November she presented a petition for liberty to traverse the inquisition, and for the stay of all further proceedings before the Masters. On 13th November the Lords Justices made an order staying all proceedings before the Masters, with liberty to apply to the Court. On 25th November an order was made giving Mrs. Armstrong leave to traverse the inquisition, and directing the traverse to be tried before a special jury in Middlesex, on or before 1st March, 1858. No committee of the person or estate of the alleged lunatic was appointed.

About the end of 1857 Captain Armstrong had a severe attack of illness, which took away his memory and reduced him to a state of total incapacity for business. Previous to this, he had given instructions to his solicitor as to the proceedings on the traverse.

Mrs. Armstrong had a considerable fortune vested in \* three trustees, viz., her cousin Mr. Martinez, Dr. Arnot, \* 124 and Dr. Merryon.

Under these circumstances, there being, in consequence of Captain Armstrong's incapacity, a difficulty as to the conduct of the proceedings, a motion was made in his name by his next friend, before the Lords Justices, on 15th January, 1858, that it might be referred to the Masters in lunacy to approve of an interim committee of the person and estate of Mrs. Armstrong, or that Mr. Martinez might at once be appointed such interim committee, or that such directions as the Court should think fit might be given as to the conduct of the proceedings. Their Lordships declined making an order on motion, and required a petition to be presented.

A petition was accordingly presented in the name of Captain Armstrong, by his next friend, praying as above, and now came on to be heard before the full Court.

*Mr. Malins* and *Mr. Jolliffe* appeared for the petitioner.

*Mr. Cairns* and *Mr. W. Morris*, for Mrs. Armstrong, suggested that no order was necessary, for that the solicitor who had received instructions from Captain Armstrong would be justified in acting on them.

*Mr. Eddis*, for Mrs. Armstrong's trustees, submitted to act as the Court should direct.

Their Lordships declined to appoint an interim committee of the estate, but appointed those two of the trustees who were not relations of Mrs. Armstrong interim committees of her person, with liberty to take such proceedings with respect to the traverse as they should think fit.

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1858. January 26. Before the LORDS JUSTICES.

The Court by consent made an immediate decree in a cause not in the paper for the administration of the real and personal estate of an intestate at the suit of a creditor, after a summons in chambers for the administration of the personal estate had been taken out by another creditor, which was returnable before the first day on which the cause could be heard as a short cause.<sup>1</sup>

THIS was a suit by a creditor for the administration of the real and personal estate of an intestate. The heir and the administrator consented to an immediate decree on motion, and the plaintiff accordingly applied, on 26th January, to Vice-Chancellor KINDERSLEY for a decree, the cause not being in the paper. His Honor asked whether any other proceedings were pending, and was informed that another creditor had taken out a summons in chambers, returnable on the 28th inst., for administration of the personal estate. His Honor, upon hearing this, refused to take the cause out of the regular course. The application was thereupon renewed before the Lords Justices.

*Mr. Wickens*, for the plaintiff, opened the case.

The Lord Justice TURNER asked why the cause could not come on in its regular course, as a short cause.

<sup>1</sup> See 1 Dan. Ch. Pr. (4th Am. ed.) 799; 2 ib. 973.

*Mr. Wickens* said, that in that case it could not be heard till Saturday, the 30th inst., and in the mean time the other creditor would have obtained an order for the administration of the personal estate alone.

*Mr. Batten* appeared for the administrator and the heir-at-law, and consented to an immediate decree.

Their Lordships made the usual decree for the administration of the real and personal estate of the intestate.

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\* In the Matter of THE QUEEN and CARL VON FRANT- \* 126  
ZIUS.

1858. January 28. Before the Lord Chancellor Lord CRANWORTH.

The Attorney-General may dispense with the usual preliminary investigation on a petition of right.

On applying for time to answer the case found on the inquisition, the Crown ought not to be precluded from demurring.

THIS was a petition of right, presented by a native of Prussia, complaining of an alleged breach of contract by the lords of the admiralty, who had unjustifiably, as the suppliant alleged, refused to accept from him certain quantities of salt pork ordered by them for the Baltic fleet. The ground of rejection was alleged deficiency of weight, which the suppliant denied to have existed when the stores were delivered.

The petition had been indorsed by her Majesty with the usual direction, "Let right be done."

On the 1st of August, 1857, the usual application was made to the Lord Chancellor (by *Mr. Rolt* and *Mr. Archibald*) for a commission to find the right or title of the petitioner, according to the practice as stated in the *Baron de Bode's Case*. (a)

(a) 2 Ph. 85; 8 Q. B. 208; and see *Re Robson*, *Ibid.* 84; and *Clayton v. Attorney-General*, 1 C. P. Cooper's Rep. 97. Mr. Archibald has also kindly referred the reporters to the following authorities on the general subject: *Simpson v. Clayton*, 4 Bing. N. C. 766; *Smith v. Upton*, 6 Man. & Gr. 251, n., and the *Bankers' Case*, 14 State Trials, 6; and see *Stanford Prerogativa Regis*, c. 22, and *Allen on the Royal Prerogative*, p. 96.

*The Attorney-General* (Sir RICHARD BETHELL), with whom was *Mr. Wickens*, said that hitherto the course usually adopted on petitions of right had been this: The petition went to the \* 127 Secretary of State, who transmitted \* it to the law officer of the Crown. The duty of the law officer was this, to see whether a reasonable case was made for relief. If it was, the Crown indorsed the petition in the usual way, directing right to be done, and thereupon the petitioner moved for a commission, unless the allegations of the petition were admitted. On this motion commissioners were appointed to make a preliminary *ex parte* inquiry, for which purpose a jury was summoned, and a considerable expense was incurred for the mere purpose of ascertaining whether there was a *prima facie* case. He (the Attorney-General) was not disposed, unless the Lord Chancellor thought that the ordinary course must invariably be followed, to adopt it on the present occasion. For, according to this practice, it might be necessary in this case to send out a commission to the Baltic to take evidence in support of the allegations contained in the petition, although the evidence thus taken would be of no avail to the petitioner upon any trial of the claim which would ultimately take place. The only use of it would be, to enable the Attorney-General to form an opinion whether the claim ought to be resisted. If, therefore, the Lord Chancellor saw no objection, he (the Attorney-General) would consent to the suppliant being at once permitted to bring an action without any preliminary inquiry. He referred to the *Baron de Bode's Case* (a) and *Viscount Canterbury's Case*. (b)

*Mr. Rolt* and *Mr. Archibald*, on behalf of the suppliant, suggested that the Court of Queen's Bench might decline to assume jurisdiction, as no writ could issue directly against the Crown or the Attorney-General, and they proposed that a commission should be directed *pro forma*, on which a return might be made without summoning a jury.

\* 128     \* The case stood over till August 5th to enable counsel to agree upon some course by which the expense of a preliminary inquiry might be avoided, and on that day —

(a) 2 Phil. 85; 8 Q. B. 208.

(b) 1 Phil. 306.

*Mr. Archibald* explained the mode of proceeding which, with the consent of the Attorney-General, was proposed to be adopted, unless the Lord Chancellor saw any objection to it. He said that the commission usually contained a precept to the sheriff to summon a jury before the commissioners by whose oaths the inquisition was to be taken. It was now proposed to omit the precept to the sheriff, and to issue a commission to the attorney of the suppliant empowering him, in the usual words of the commission, to inquire into the truth, &c., and also empowering him to receive affidavits. Under such a commission the attorney would return an inquisition upon which a traverse might be taken and issue joined and carried into the Court of Queen's Bench for trial in the usual way, and if no objection were taken by the Attorney-General, probably none would be made by the Court on the ground of want of jurisdiction.

*Mr. Wickens* said that the Attorney-General did not object to this.

The Lord Chancellor said he saw no objection to the proposed course, which still appeared to his Lordship rather cumbrous. It seemed, however, better to appoint some other person, and not the suppliant's attorney.

It was then arranged that the commission should issue directed to two commissioners.

A commission issued accordingly, and an inquisition was taken finding the right of the suppliant upon affidavits of \*deponents therein mentioned. It was returned and \*129 filed in the petty bag.

*Mr. Archibald* moved to confirm the inquisition.

*Mr. Wickens*, for the Attorney-General, required time to plead or demur.

*Mr. Archibald* submitted that, having regard to the arrangement made as to the inquisition, the Attorney-General ought not

to be allowed to demur. He referred to *Viscount Canterbury's Case.* (a)

The Lord Chancellor held that the Crown ought to have an opportunity either of demurring or of disputing the allegations contained in the petition, as should appear the more advisable.

The order was, that the inquisition should be confirmed unless the Attorney-General should plead or demur thereto within a month.

January 28.

The inquisition was afterwards traversed by the Attorney-General. Issue was joined, and the record carried for trial into the Court of Queen's Bench, where the trial came on in June, 1858 ; but the claim was then settled by the Crown.

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*Ex parte JOHN JAMES RUSSELL.*

1857. November 18. December 4. Before the Lord Chancellor Lord CRANWORTH.

Where it appeared that a master and his foreman had both invented certain improvements, for which the master sought letters-patent: Held, that they ought only to be granted on the terms of their being vested in trustees for the master and the foreman.

In general, where there is a doubt as to the validity of the grounds of opposition to a patent, the proper course is to grant the letters-patent, as an error in refusing them would be irremediable, while one in granting them would not.

THIS was a petition praying that the Great Seal might be affixed to certain letters-patent for improvements in the manufacture of metal tubes.

The petitioner had on the 28th of March, 1857, presented his petition for letters-patent, and obtained provisional protection in

(a) 1 Phil. 306.

due course ; and on the 7th of September, 1857, the Attorney-General issued his warrant for sealing the letters-patent.

On the following day the respondent George Henri Marc Muntz gave notice of an objection to the sealing of the patent, on the ground that the improvements in question were invented by him, and not by the petitioner.

The present petition sought that the Great Seal might be affixed, notwithstanding the respondent's objection.

Affidavits were filed in support of and in opposition to the petition, and the result of them appeared to be that the petitioner and the respondent (who had been in the petitioner's employ as a foreman or manager) had both contributed towards the invention, or had independently arrived at the same result. There were conflicting statements in the affidavits, but the following statements in one of the respondent's affidavits were not contradicted :—

“ I asked the said John James Russell's opinion upon \* my invention as aforesaid, when he tried to persuade me \* 131 not to make it the subject of a patent, but I told him that I should patent it, and thereupon the matter dropped. On the 27th day of March, 1857, the said John James Russell called me to him in his office, and then read to me a proposed provisional specification for ‘John James Russell's improvements in metal tubes.’ I expressed my surprise and astonishment, and then told him that the invention was mine, but I was so unprepared for such conduct that I was not in a fit state to discuss the matter with him. I thereupon went away, and mentioned the fact of the said John James Russell's intention to patent my invention to the said Mr. Bredt, and after some discussion on the subject with him I went back to the said John James Russell, and then asked him whether he could with honour proceed in further prosecuting the said patent, whereupon he answered, ‘I cannot.’ I thereupon asked him whether he would proceed without honour, to which he answered, ‘God forbid that I should do so.’ ”

*Mr. Malins, Mr. Webster, and Mr. Boyle*, in support of the petition.

*Mr. Digby Seymour and Mr. J. N. Higgins*, in opposition.

THE LORD CHANCELLOR.—This is an application to have the Great Seal affixed to certain letters-patent for an invention of an improved mode of manufacturing metal tubes. Mr. Russell, who makes the application, is a manufacturer of tubes at Birmingham.

Mr. Muntz, who is opposing it, was a workman employed \* 182 by him. It is said that Mr. Muntz \* was receiving a salary of 300*l.* a year. He was an intelligent and skilled foreman or manager, or one of the principal persons in Mr. Russell's employ, and both he and Mr. Russell were persons capable of making inventions of this sort, nor as to either of them can it be said to be at all improbable that he should have hit upon some scheme for the improvement now in question.

And when Mr. Russell now applies for letters-patent, all that he has to establish by reasonable evidence is, that he was the inventor, and not Mr. Muntz, because that the invention was made by one or the other, or both, is not disputed. The question is, whether he has so satisfied me that he is the sole inventor, that I ought to let him have these letters-patent, which would give him a *prima facie* title to the exclusive enjoyment of the invention.

Now, there have been many cases of the sort before me, and the principle on which I have generally acted has been, that where a matter is much in doubt, it is better to run the risk of putting the party opposing the grant to the costs of making out his case in some ulterior proceedings, than to withhold the Great Seal from the letters-patent in the first instance, for the obvious reason, that the one course would create a remediable, and the other an irre-mediable injury. The question here is, whether there is sufficient doubt in the present case as to who was the inventor of this improvement to render it right to take the course to which I have adverted.

On that subject, had it not been for some passages in the affidavits, to which I shall presently advert, I should have been of that opinion. But having regard to those passages, there ap-\* 183 pears to me enough to satisfy my mind \* of this,—not that

Mr. Russell was the inventor,—not that Mr. Muntz was the inventor,—but that they are both the inventors. That was a most natural and probable state of things. Both of them were engaged in the manufacture to which the invention applied. Both felt the want of such an invention; both were aware of the general

principles on which such an invention must proceed, and I have no doubt that from time to time one contributed one suggestion and the other another, so that in the end when, on the 27th of March last, the specification was finally drawn out, it was not in the power of either to state positively, and without doubt, to whom the merit of the invention was to be attributed. It was, in truth, to be ascribed, in some degree, to one, and, in some degree, to the other.

In arriving at that conclusion, I do not rely upon the portions of the affidavits which are in conflict, and in which each party swears that he was the inventor. I do not suppose that, in those statements, either means thereby to swear any thing positively untrue, for I believe that each thinks he was the inventor, each being conscious that he had invented a material step towards the arrival at this important result.

Mr. Muntz makes this statement upon his affidavit: [His Lordship read the statement set out, *ante*, page 128.]

Now, this conversation is not denied by Mr. Russell. He denies some other matters which were connected with the same conversation, but he does not deny that upon the specification being read over to him, Mr. Muntz said he was not in a state to discuss it; that he then went away and returned soon afterwards, and said to Mr. \* Russell, " You do not mean really \* 134 to proceed upon this as your patent: you cannot do that in honour ; " that Mr. Russell said, " I cannot do it in honour," and that Mr. Muntz then asked, " Do you mean to do it in dishonour ? " to which Mr. Russell answered, " God forbid I should do that." He does not deny a word of that, nor does he deny that Mr. Muntz (having lived with him two or three months afterwards) frequently came to him and reminded him of the conversation, or that Mr. Russell said, " You must rely upon me." What does that amount to ? Why, that Mr. Russell felt the impossibility of defining exactly how much of the invention was attributable to the mind of one, and how much was attributable to the mind of the other, and that it was not an honest thing for him, the master, to be obtaining letters-patent for an invention, some portion at least of which was the invention of his servant. Now, that appears to me to be the irresistible conclusion from these affidavits. Mr. Russell denies a great deal of what is alleged, but he does not deny any part of that to which I have just adverted.

There appears to me in these circumstances a way of solving the difficulty which will do justice to both parties, and it is this: not to allow the Great Seal to be placed to these letters-patent unless Mr. Russell will consent to sign a document, to be approved of by myself or by some officer of the Court, constituting a trustee of the patent jointly for himself and Mr. Muntz, Mr. Muntz agreeing in such case to abandon all application for his own patent. If the parties will enter into this agreement, then the letters-patent will be sealed, but not otherwise. [Mr. Muntz, who was in Court, intimated his assent to the suggested course.] Then the letters-patent of Mr. Russell will be sealed, he undertaking

\* 135 \* to constitute himself a trustee jointly for himself and Mr.

Muntz. Of course the patent will be liable in the first instance to pay all the expenses that Mr. Russell has been put to in obtaining it.

December 4.

On this day a discussion took place as to the form of the proposed trust, and it was ultimately ordered that the petitioner and respondent should be treated as if they were joint grantees of the letters-patent. That the letters-patent should be granted to two trustees, one to be named by each party. Each party to have a free license to himself and partners (if any). All costs of both sides properly incurred in the matter of the patent to be borne and paid equally by both, and the costs also of Mr. Muntz's application for the patent. A deed to be prepared accordingly, and if the parties differed, to be settled by the conveyancing counsel of the Court.

1858. February 11. Before the LORDS JUSTICES.

G. having entered into a contract for the purchase of a ship not binding under the Registry Acts, agreed with the plaintiff that the plaintiff should set up engines in her, to be paid for at a specified price if a certain speed was attained, but, if not, to be removed by the plaintiff. The plaintiff, with the knowledge and approbation of Y., the registered owner, set up the engines, which did not enable the vessel to attain the required speed. Y. then

refused either to pay the stipulated price or to allow the plaintiff to remove the engines: *Held*, reversing the decision of the Court below, that the plaintiff's remedy against Y., if any, was at law, and that there was no ground for equitable interference.

The equitable rule, as to the effect of a person's lying by and allowing another to expend money on his property, does not apply where the money is expended with knowledge of the real state of the title.<sup>1</sup>

THIS was an appeal by the defendants, G. F. Young and Sidney Young, from a decree of the Master of the Rolls.

In December, 1853, the defendant Green entered into arrangements for the purchase of a ship called the "Times," of which a Mr. Penn was the registered owner, and in contemplation of this purchase he entered into an agreement with the plaintiff, for the plaintiff to fit up the ship with engines of a particular description, for which the plaintiff was to be paid 1200*l.* if a certain speed were attained. The plaintiff alleged that the use of these engines was intended by both parties as an experiment. About the same time arrangements were made between the Youngs and Green as to the purchase, the effect of which was that the Youngs were to purchase the ship from Penn, and that Green was to be at liberty to purchase it from them on certain terms. The result of these arrangements with the Youngs and Green was that the ship was transferred by Penn to S. Young by a bill of sale, dated 23d December, 1853, duly registered on 11th January, 1854, and purporting to be an absolute transfer, so that S. Young acquired a complete title to her.

\* In the same month of December, 1853, the plaintiff, \* 137 having learnt that the Youngs had an interest in the ship, entered into communication with them as to the engines. On 15th December, 1853, the Youngs wrote to the plaintiff a letter, stating, that, when he had fitted the engines and secured the guaranteed speed, they should sell the vessel, and apply the proceeds, after payment of their own claim, in paying what would be due to him under his agreement with Green. They at the same time requested the plaintiff to inform them of the time by which the engines would be ready for trial.

The plaintiff's solicitors then prepared the draft of a formal agreement between the Youngs, Green, and the plaintiff as to the

<sup>1</sup> See 2 Story Eq. Jur. § 1543; 2 Smith Lead. Cas. (5th Am. ed.) 661, 662; Ramsden v. Dyson, L. R. 1 H. L. 129; 2 Sugden V. & P. (8th Am. ed.) 749, and note (u).

engines.. On 4th January, 1854, the Youngs wrote to the plaintiff declining to approve of the draft, but making an offer to the following effect, that when Green had completed his contract with them by payment of 4200*l.*, they would pay the plaintiff 750*l.*, on his producing Green's certificate that the plaintiff's agreement with Green had been fulfilled, and then, after satisfying their own claims against Green, would pay the residue of the plaintiff's claim out of the surplus ; and that if Green did not fulfil his contract with them, they would sell the vessel, with engines and equipment, and in case of its realizing 4200*l.*, deal with the plaintiff's claim as if that sum had been received from Green. The letter concluded, " We trust this offer will be satisfactory to you, and that in reply you will give us your assurance that you will fit the engines on board the 'Times,' in accordance with your contract with Mr. Green, as on that assurance only shall we feel justified in completing the purchase of the said vessel."

The plaintiff thereupon proceeded with the engines. On \* 138 10th February, 1854, a written contract for them \* was entered into between the plaintiff and Green, by which it was agreed that 1200*l.* should be paid for the engines if a speed of from eight to nine knots an hour was attained ; but if the engines did not answer that condition, then the plaintiff should remove them from the vessel without expense to Green. The Youngs denied all knowledge of this agreement.

In the course of fitting in the engines, it was found that some alterations in the vessel were requisite, and they were done by the plaintiff with the sanction of the Youngs, and by the written order of Green.

The engines were fitted into the vessel in August, 1854, but the vessel did not attain the required speed, and on 18th December, 1854, Green sent a written order to the plaintiff to remove the engines. On 21st December, the plaintiff wrote back complaining that the order was unreasonably late, but consenting to remove the engines. The Youngs, however, refused to allow them to be removed. On 8th March, 1855, Green released all his interest in the ship to the Youngs, they undertaking to settle the demand of the plaintiff.

Negotiations then took place between the plaintiff and the Youngs, into which it is not necessary to enter ; but it may be right to state, that the case made by the Youngs was, that they

throughout understood the plaintiff to have simply contracted to supply engines which would produce a given rate of speed, and that they knew nothing of any special contract as to removing them, or of the insertion of engines of this description being looked upon as an experiment, and that they had sustained heavy loss in consequence of the engines not being completed in proper time, and being useless when completed. The parties being unable to come to any arrangement, the \* plaintiff filed his \* 139 bill against the Youngs and Green, praying that the defendants might be decreed to pay the plaintiff the 1200*l.* and the cost of the extra works, and that in default the ship might be sold and the plaintiff's claim satisfied out of the proceeds; that the Youngs might be restrained from selling or mortgaging the ship, or removing her from the port of London, and for further relief. The Master of the Rolls, on 23d November, 1857, made a decree, giving the plaintiff liberty to bring such action as he might be advised against Green (such action to be defended by the Youngs) and, for the purposes of the action, the defendant was to admit, that all the agreements, writings, admissions, and other acts of the Youngs about the matters in question were done and entered into by them as Green's agents, and such agreements, writings, admissions, and acts were to be received in evidence accordingly. The decree further directed, that the verdict and costs should be dealt with as the Court should direct, and ordered the plaintiff to pay Green's costs, without prejudice to how they should be ultimately paid. Further proceedings against Green were stayed.

The Youngs appealed against the whole decree.

*Mr. Roundell Palmer* and *Mr. Shapter*, for the plaintiffs, in support of the decree. — Our case is, that the Youngs encouraged us to put engines in their ship under our agreement with Green; then they refused either to pay for them or to let us carry them away, though they were aware all along that it was a term of our agreement that we should take them back if not approved.

[THE LORD JUSTICE KNIGHT BRUCE. — If the Youngs contracted with you, have you not a remedy at law? If they did not, how can you have any right against them? Can the authorities as to

- \* 140 lying by have any application, except where the person  
expending \* his money is ignorant of the title afterwards  
set up ?]

We have no legal remedy against the Youngs, for we did not contract with them, and the engines are now part of their ship : *Goss v. Quinton*; (a) we are advised that we have none against Green, who has acted *bond fide*, and done all he can to keep his contract. We ask for equitable relief on a principle similar to that of *Thornton v. Court*. (b)

*Mr. Follett*, for Green.

*Mr. Lloyd* and *Mr. Speed*, for the Youngs. — The Court, if it directs an action, will not direct such admissions to be made as are required by the order of the Master of the Rolls ; *Elderton v. Lack*, (c) *Butlin v. Masters*. (d) But we say that there is no ground for equitable interference at all. It may be that the plaintiff has no remedy at law, but the want of a legal remedy does not create an equitable right ; instances of this are found in *Kirk v. Bromley Union*, (e) *Jackson v. North Wales Railway Company*. (g) Cases like *Thornton v. Court*, in which a person has by improper conduct taken away the plaintiff's legal right, stand on an entirely different footing. Lying by is out of the question ; all the cases in which relief has been given on that ground have been cases in which the equitable claimant has been ignorant of the true title to the property, and the equity arose from a suppression of title equivalent to a representation that such title did not exist. Here the plaintiff knew of the true title throughout.

- Mr. Shapter*, in reply. — Our equity is this,— that a person standing by and \* allowing and encouraging a third party to acquire legal rights against a second, and afterwards defeating for his own benefit those rights, is bound to indemnify the loser. [ *Onslow v. Currie* (h) was referred to.]

(a) 3 Man. & Gr. 825.

(e) *Ibid.* 640.

(b) 3 De G., M. & G. 298.

(g) 13 Jur. 69.

(c) 2 Phill. 680.

(h) 2 Mad. 345.

(d) 2 Phill. 529.

THE LORD JUSTICE KNIGHT BRUCE.—The plaintiff executed an order for certain engines, for which he was to be paid, and did certain further works for which he was to be paid, by the defendants or some or one of them. What equity arises from this I cannot see. Had there been a lien on the vessel, which it is admitted there was not, and that lien had been defeated by the acts of the defendants, I might possibly have acceded to the argument on the part of plaintiff. But here no lien is claimed on the vessel or on the machinery. If the plaintiff is entitled to have the machinery restored, and it shall not be restored, he may pursue his legal remedies. How the plaintiff's right can be made either better or worse by what passed between the defendants I cannot see. His demand is a mere money demand for labour and materials. If he has a right it is a right to be enforced at law, and I see no ground for transferring the case hither. The bill must be dismissed with costs, without prejudice to any action.

THE LORD JUSTICE TURNER.—I also am of opinion that the decree cannot be supported, and that the bill must be dismissed. The decree is intended to work out relief against the Youngs, for it stays all further proceedings against Green. Lien must be laid out of the case, for it is admitted that no claim \* to \* 142 a lien can be maintained. What case, then, is there in equity against the Youngs? Either they were under a contract with the plaintiff or they were not. If they were, the plaintiff's remedy is at law. If they were not, then the only circumstance on which an equity can be founded is, that they allowed the plaintiff to put his machinery into a ship which legally belonged to them. But the plaintiff does not say that he did not know that the ship belonged to them. If a man places his property on the land of another person with full knowledge of that person's title, how can the fact that the land-owner assented to its being placed there give an equity to have it restored? If it did, the doctrine would come to this,—that whenever a man lays out money on another person's land with the consent of the owner, he has an equity to have it repaid. It struck me at one time that the plaintiff might be entitled to an equity in consequence of the agreement of 10th February, 1854, for that the Youngs having bought the right of Green must take subject to the liabilities arising under

that agreement; but the Ship Registry Acts prevent such a case from being effectually raised. The bill must be dismissed with costs; but I agree to the dismissal being expressly without prejudice to any action.

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1858. February 13. Before the LORDS JUSTICES.

A testator gave a fund to trustees in trust to pay the income to his sister for her life or "apply the same, or so much as may be necessary for her support and maintenance, in such manner as may be most to her comfort and advantage." He then directed the surplus, if any, to be accumulated and added to the capital of the fund, which was given over after her death. The sister, who was of unsound mind, was entitled to a life-interest under a settlement of which the testator was a trustee. After the testator's death she was found lunatic, and the allowance for her maintenance was fixed at a sum exceeding the income of the bequeathed fund: *Held*, that this income was the primary fund for her maintenance, and that therefore the whole of it must be so applied.<sup>1</sup>

THOMAS SHEPHERD, by will dated 26th March, 1842, after making various specific bequests to various persons, and, among others, to Jones Rudland, the husband of the testator's sister Frances Rudland, gave directions for the conversion and investment of his residuary estate, and directed that the income should be paid as follows: "One-half part of such annual produce to the said Jones Rudland, from the time of my decease, during the joint lives of himself and his wife Frances Rudland, and if my sister, the said Frances Rudland, should survive him, then to pay such half part of the said annual produce to my said sister for her life, or apply the same, or so much as may be necessary for her support and maintenance, in such manner as may be most to her comfort and advantage, and if there be any surplus, such surplus to be accumulated during her life, or so long as it may by law be accumulated, and the accumulations to be for the benefit of those who

(*a*) See *Methold v. Turner*, 4 De G. & Sm. 249.

<sup>1</sup> See 1 *Jarman Wills* (3d Eng. ed.), 368.

under my will may become entitled to the fund whence such accumulations may arise." The testator then directed the income of the other moiety to be paid to his brother George Shepherd for life, and, subject to the above trusts, gave the whole residuary estate to the children of two of his cousins.

The testator died on 28th March, 1846. The trustees \* got in the residuary estate. The moiety in which Mrs. Rudland was interested amounted to 22,475*l.*, bank 8*l.* per cent annuities, producing 674*l.* 5*s.* a year.

Jones Rudland died on 3d September, 1856, and on 23d December, 1856, Mrs. Rudland was found lunatic. She had been of unsound mind from a period before the date of the will. By inquiry in the lunacy it was found that she was absolutely entitled to several sums of stock, standing in the names of the trustees of her marriage settlement, and producing in the whole an income of 438*l.* 19*s.* The testator from the time of Mrs. Rudland's marriage till his own death had been the principal acting trustee of this settlement, under which, in the event of her surviving her husband, she would have been entitled for life to the income of the settled fund, had she acquired no greater interest in it.

By an order made by the Lords Justices in the lunacy on 3d July, 1857, it was ordered that 750*l.* a year should be allowed for her maintenance and support, and that the committee of her estate should be at liberty to file a bill or claim in chancery to obtain the decision of the Court as to her rights under her brother's will.

The present bill was accordingly filed for the purpose of settling the question whether the income derived under the will, or the income of Mrs. Rudland's own property, was the primary fund for her maintenance. The cause came on to be heard before the Lords Justices in the first instance.

*Mr. Selwyn, Mr. Toller, Mr. Boyle*, for the plaintiffs, Mrs. Rudland and the committee of her estate.—The whole income appropriated by the will for Mrs. Rudland's benefit is insufficient for her maintenance, \* and the whole of it ought, therefore, \* 145 to be applied. The will plainly expresses such an intention. If she were not a lunatic, it would clearly be most for her benefit that her maintenance should come out of this income, and the lunacy makes no difference in considering what is most advantageous for her. The cases as to infants, *Foljambe v. Wil-*

*loughby*, (a) *Ravenhill v. Dansey*, (b) and the other cases collected in Chambers on Infancy, (c) show, by analogy, that what is most for her benefit must be ordered.

*Mr. Lloyd, Mr. Follett, Mr. Hislop Clarke, Mr. Charles Hall, Mr. E. R. Turner, and Mr. Rawlinson*, for the residuary legatees. — The trustees, in the honest exercise of their discretion, have refused to allow the whole of this sum for maintenance, and the Court will not interfere. Apart from the lunacy, they have a discretion under the direction for maintenance. *Hammond v. Neame*, (d) *Cowman v. Harrison*. (e) The lunacy fixes the amount necessary for her maintenance, but does not otherwise bear upon the question. In the case of *In re Sanderson*, (g) the Vice-Chancellor relied much on the fact that there was no direction for accumulation, and no gift over of the surplus income. The testator knew the state of the lunatic's property: the intention which he was most likely to form was to give a fund in aid of it, not to give a fund out of which she was to be almost entirely maintained, leaving most of the income of her own property to accumulate, and his words support the view, that such was his intention. The contrary construction strikes out of the will the trust for the accumulation of surplus. When he speaks of \* 146 "necessary for her support" he \* must be supposed to mean such further sum as should be necessary for her support, having regard to the amount of income which he knew her to possess. The words "as may be most to her comfort and advantage," are not against us. What the plaintiffs ask for is something which is neither for her comfort nor advantage, but solely for the benefit of her next of kin.

The Lord Justice KNIGHT BRUCE during the argument asked whether the residuary legatees wished for an opportunity of contending that the amount of maintenance, allowed by the order in lunacy, was too large, and was informed that they did not.

A reply was not called for.

- (a) 2 S. & S. 165.
- (b) 2 P. Wms. 179.
- (c) Page 351.

- (d) 1 Sw. 35.
- (e) 10 Hare, 234.
- (g) 3 K. & J. 497.

THE LORD JUSTICE KNIGHT BRUCE.—In this case it is agreed that there are but two sources from which the lady can be maintained,—one, the income provided by her brother's will; the other, her own property independent of that will. It is agreed, also, that the annual amount proper for her maintenance according to her position and condition is greater than the annual income appropriated for her benefit by her brother's will. In these circumstances, the whole of the income appropriated, or capable of being appropriated, under the brother's will, must be first applied for her maintenance. The costs of the suit must be paid out of the capital of the residuary estate, applying in the first place so much as remains of that moiety of the residue in which the lady is not interested.

THE LORD JUSTICE TURNER.—I am of the same opinion. It has been urged that \* the testator intended to give the trustees a discretion as to the amount of income to be applied for this lady's maintenance. He might have expressed such an intention on the face of his will, and such an intention is not to be imputed to him unless he has expressed it. It was urged that the surrounding circumstances must be looked at; but, on looking at them, I do not find that they demonstrate an intention one way or the other. The question then is reduced to this, What do the words of the will mean? The words are these: [His Lordship here read the clause.] How are you to measure what is necessary but by what is the annual sum wanted for her support and maintenance? The case is made stronger when you see that the whole income is given to her if of sound mind, and stronger still when it is considered that the testator, being a trustee of his sister's marriage-settlement, must have known that, on the view which the defendants take, there would be a surplus, but that, nevertheless, he speaks of the surplus as contingent.

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## \* DOUGLAS v. ARCHBUTT.

1858. February 16. Before the LORDS JUSTICES.

Property was assigned to the plaintiff (who was known to the assignor to be an auctioneer, though not described in the deed as such), upon trust to sell by public auction or private contract, and out of the sale moneys to pay the costs, charges, and expenses of preparing for, making, and completing such sales, "including the usual auctioneers' commission." Held, that the plaintiff, if he acted as auctioneer at the sale, could retain his own commission.<sup>1</sup>

THIS was an appeal by the assignees in bankruptcy of Thomas Archbutt from a decree of the Master of the Rolls. The only question of substance was, whether the plaintiff, who was an auctioneer and trustee of a deed of assignment, was entitled to auctioneers' commission under the terms of the deed.

The deed in question was dated 14th November, 1854, and made between Archbutt of the one part, and the plaintiff (therein described only as an "upholder") of the other part, by which Archbutt assigned certain personal estate to the plaintiff, upon trust that the plaintiff, his executors, administrators, or assigns, should sell it either by public auction or private contract, "and do and shall apply the moneys to arise by such sale or sales in the first place in payment of the costs, charges, and expenses of these presents, and of preparing for making and completing such sales, including the usual auctioneers' commission, and otherwise incidental to the aforesaid trusts, and also in effecting or keeping up any insurance of the said hereditaments and premises which the said W. Douglas, his executors, administrators, or assigns, may think necessary." The deed then declared the trusts of the clear surplus of the sale moneys, being trusts for indemnifying the plaintiff in respect of certain bills of exchange bearing even date with this deed, and accepted by the plaintiff for the purpose of carrying out an arrangement between Archbutt and his creditors.

\* 149 \* The plaintiff was an upholsterer, auctioneer, and estate agent, and it was well known to Archbutt at the time of the execution of the deed that he was carrying on business as an auctioneer.

<sup>1</sup> See 1 Dart V. & P. (4th Eng. ed.) 166; 2 Dan. Ch. Pr. (4th Am. ed.) 1414; 1 Sugden V. & P. (8th Am. ed.) 44.

By a memorandum of even date with the above deed, Archbutt agreed to assign to the plaintiff certain leasehold property upon the same trusts as were declared by the deed concerning the property thereby assigned.

The bill was filed to compel Archbutt to execute an assignment for the purpose of carrying into effect a sale made by the plaintiff of the leasehold property, and to have an account taken of the moneys received by the plaintiff under the trusts, and of his application of them. Archbutt having become bankrupt before answer, the suit was prosecuted against his assignees; and on 10th June, 1857, the Master of the Rolls made a decree ordering the defendants to execute an assignment, and directing an account as prayed by the bill of all dealings and transactions by the plaintiff under the trust-deed and the memorandum of agreement. Then followed this direction: "And in taking such account, it is ordered that the said plaintiff be at liberty to charge the usual auctioneers' commission in respect of such dealings and transactions, and in taking the same all just allowances are to be made." The defendants appealed against the whole of the decree, taking various objections of a formal character which do not appear to call for a report, it being admitted that the only real question between the parties was, whether the plaintiff could under the terms of the deed charge his own commission as an auctioneer.

*Mr. Roundell Palmer* and *Mr. H. F. Bristowe*, in support of the decree.

\* *Mr. Selwyn, Mr. Lovell, and Mr. Daunay*, for the appellants.—No doubt a *cestui que trust* who is *sui juris* may agree that the trustee shall be entitled to charge for his services, but the stipulation to that effect must be clear. *Moore v. Froud*, (a) *Matthison v. Clarke*, (b) *Broughton v. Broughton*. (c) In the present case there is nothing to show that the plaintiff was intended to act as auctioneer, he is not described in the deed as being one. Among all the items of expenses payable out of the fund not one beside this is mentioned which could be paid to him, and there is nothing to point at an intention that this should be. The clause enabling a trustee to charge professional expenses

(a) 3 Myl. & C. 45. (b) 3 Drew. 3. (c) 5 De G., M. & G. 160.

is a well known common form, from which this departs as far as is possible consistently with leaving it capable of raising the question.

[THE LORD JUSTICE KNIGHT BRUCE.—What occasion was there to specify auctioneers' charges, unless the plaintiff was to be at liberty to charge his own?]

The deed specifies a number of other charges which if not mentioned would still have been payable out of the fund.

THE LORD JUSTICE TURNER.—The only question of substance in this case is, whether the plaintiff Mr. Douglas is entitled to charge his commission as auctioneer. It was known to Archbutt at the time of his executing the deed, that the plaintiff carried on business as an auctioneer. The deed contains directions that the plaintiff shall sell by public auction or private contract, and shall apply the moneys to arise from the sale in the first place in payment of the costs, charges, and expenses of the deed, "and \* 151 of preparing for, making, \* and completing such sales, including the usual auctioneers' commission, and otherwise incidental to the aforesaid trusts." The deed, therefore, contemplates a sale by auction. If the words "including the usual auctioneers' commission" had not been inserted, it would have been competent to the plaintiff under the other words to charge any auctioneers' commission paid by him. These words, therefore, were not wanted for that purpose, and for what purpose can they have been inserted, but to authorize the plaintiff to charge auctioneers' commission if he himself acted as auctioneer? [His Lordship then gave his reasons for considering that the objections taken to the decree in point of form were untenable, and that the appeal must be dismissed.]

THE LORD JUSTICE KNIGHT BRUCE.—I entirely agree.

## HANNAM v. SIMS.

1858. February 12, 18. Before the LORDS JUSTICES.

A testator devised his real estate to his wife for life, with remainder to his son for life, and then in undivided shares among his own brothers and sisters (by name), and certain brothers and sisters (by name) of his wife, and the children of a deceased brother and sister of his wife. The will contained a direction that "in case any of my said brothers and sisters, or the brothers and sisters of my said wife now living, shall happen to die in the lifetime of my said wife and son or of the survivor of them," leaving children, the share of each person so dying should go to his child or children. One of the testator's brothers named in the gift had died before the will was made.

*Held*, upon the context of the will, that the words "now living" were confined to brothers and sisters of the wife.

*Held*, also, that the words "shall happen to die" included the case of the brother named in the will, but dead at the date of it, and that the gift in favour of his children took effect.<sup>1</sup>

THIS was an appeal by the children of William Hannam from a decree of the Vice-Chancellor STUART, so far as it declared that a share in the residuary real estate of Thomas Hannam, the testator, had in the events which had happened become undisposed of.

\* The testator by his will devised his real estates to trustees upon trust for his wife for life, with remainder to his son Thomas Hanham Hannam, otherwise Thomas Hanham Jones, for life, and after the decease of the survivor to the children of T. H. Jones in manner therein mentioned, and in default of such issue the testator, after specifically disposing of part of the estate, gave the residue from the decease of the survivor of his wife and T. H. Jones in the following manner: "unto and amongst my brothers and sisters, Martha the wife of Richard Sly, Elizabeth Hidston, John Hannam, George Hannam, James Hannam, and William Hannam, Ann the wife of Christopher Pitcher, and Mary Robins, and the brothers and sisters of my said wife, namely, James Longden, Sarah Jones, Hester Longden, Patience Sumption, Ann Longden, and Ruth Longden, and the child and children

<sup>1</sup> See 2 Jarman Wills (3d Eng. ed.), 726-730; *In re Potter's Trust*, L. R. 8 Eq. 52.

of William Longden and Mary Halliday, both deceased (also brother and sister of my said wife), in manner following (that is to say), one sixteenth part or share each to my said brothers and sisters and the said brother and sisters of my said wife now living, their respective heirs, executors, administrators, and assigns, according to the nature and quality of the said hereditaments and premises respectively ; and to the child and children of the said William Longden, deceased, who shall be living at the time of the decease of the said Thomas Hanham Hannam (otherwise Thomas Hanham Jones) one other sixteenth part or share of the said hereditaments and premises, equally to be divided between them, if more than one, share and share alike as tenants in common and not as joint tenants, their respective heirs, executors, administrators, and assigns, and if but one such child, then to such one or only child, his or her heirs, executors, administrators, and assigns ” [here followed a precisely similar gift of another sixteenth to the child and children of Mary Halliday.] “ And my will further

\* 153 is, \* that in case any or either of my said brothers and sisters, or the brothers and sisters of my said wife now living, shall happen to die in the lifetime of my said wife and Thomas Hanham Hannam (otherwise Thomas Hanham Jones), or in the lifetime of the survivor of them, without leaving lawful issue living at the time of his or her death or respective deaths, then the share or shares hereby given or intended to or for such of them so dying shall go to and be equally divided between or amongst the survivors or survivor or others or other of them my said brothers and sisters, and the brothers and sisters of my said wife, share and share alike as tenants in common and not as joint tenants, their respective heirs, executors, administrators, and assigns ; but in case any or either of them my said brothers and sisters, and the brothers and sisters of my said wife so dying shall leave a child or children, then the share or shares of him, her, or them, so dying, leaving a child or children shall go to and be equally divided between and amongst all and every the child and children of him, her, or them, so dying, that shall be living at the time of the death of the survivor of them, my said wife and the said Thomas Hanham Hannam (otherwise Thomas Hanham Jones), if more than one, share and share alike as tenants in common and not as joint tenants, their respective heirs, executors, administrators, and assigns, and if there shall be but one such child who

shall be so living as aforesaid, then to such one or only child, his or her heirs, executors, administrators, and assigns."

The testator's brother William Hannam was dead when the will was made, and the question was raised, whether his children took the share devised to him by the will. Vice-Chancellor STUART decided against their claim, and held that this share was undisposed of and \* went to the heir-at-law. The children \* 154 of William Hannam appealed.

*Mr. Malins* and *Mr. Bird*, for the appellants. — The questions are two,— whether the words "shall happen to die" would, if standing alone, include the case of death before the will was made, and if so whether the words "now living" make against us.

The general rule is, that where there is a gift over and the prior gift fails, no matter how, the gift over takes effect. *Jones v. Westcomb*, (a) *Avelyn v. Ward*, (b) *Statham v. Bell*, (c) *Meadows v. Parry*, (d) *Murray v. Jones*, (e) *Doe v. Scott*. (g)

[THE LORD JUSTICE TURNER.— How do you make those cases apply to this, where the gift is by way of substitution ?]

The cases in which the fact of the gift being substitutionary has been held to make a difference were all cases of class gifts, where the death of a person before the death of the testator so excluded him from the class of original takers, that the will contained nothing applicable to him or his issue. Those cases, therefore, do not apply where the original taker is named. *Ive v. King*. (h) *Re Sheppard's Trust* (i) is precisely in point and is decisive in our favour; see also *Re Thompson's Trust*. (k) The words "now living" do not alter the case; they are mere words of description distinguishing the brothers and sisters who were named as objects of gift from those whose issue were the objects of gift; they mean in fact the same as "hereinbefore mentioned as living."

- (a) *Prec. Ch.* 316.
- (b) *1 Ves. Sen.* 420.
- (c) *1 Cowp.* 40.
- (d) *1 Ves. & B.* 124.
- (e) *2 Ves. & B.* 313.

- (g) *3 Mau. & Sel.* 300.
- (h) *16 Beav.* 46.
- (i) *1 K. & J.* 269.
- (k) *5 De G., M. & G.* 280.

[THE LORD JUSTICE KNIGHT BRUCE.—Are the words “now living” intended to refer at all to the testator’s own brothers and sisters ?]

\* 155 \* *Mr. Hobhouse*, for the heir.—As to the point raised by the Court, the words “now living” occur twice in the will, and must be co-extensive in the two places. Where they are first used, viz., in the original gift, they come between the whole antecedent and the relative “their,” and must, therefore, refer to the whole antecedent; i.e., brothers and sisters of the testator and of his wife. Had the contrary been intended, the clause should have run thus: “to my said brothers and sisters and the now living brothers and sisters of my said wife.”

The testator intended a distinction between the children of a person dead at the date of his will and those of a person dying afterwards; for he does not give precisely the same interest to the children of those whom he knew to be dead as he gives to the children of those who should afterwards die. The principle of *Jones v. Westcomb*, and the cases of that class, only applies where an intention is discoverable that the gift over should take effect by whatever means the prior gift is put out of the way, the error in the wording of the will being that a positive form has been used instead of a negative one. *Underwood v. Wing* (a) explains this. In *Ive v. King* nothing was said about “now living.”

*Mr. Malins*, in reply.

Judgment reserved.

February 18.

THE LORD JUSTICE KNIGHT BRUCE.—It is agreed in the present case that the testator’s brother William Hannam died \* 156 before the making of the \* will in question, and also (as I understood), that the testator’s wife and son mentioned in the will were born before William Hannam’s decease. The testator must, I think, from the contents of the will, be taken to have made it in ignorance or forgetfulness of the fact of William Han-

(a) 4 De G., M. & G. 633.

nam's death, and in the belief consequently that he was then living. The Vice-Chancellor in deciding for the testator's heir against the children of William Hannam, as to the share of the devised real estate which he would under the will have taken had he survived the testator's wife and son, was influenced (it was stated at the bar) by the view that his Honor took of the words "now living," which occur more than once in the instrument. Whether I should have thought these words material in the controversy, had they in my opinion been meant by the testator as referring to the brothers and sisters of himself and of his wife respectively, I need not say, for I think that, by the whole contents of the will taken together, it is shown that the testator meant the words to refer to his wife's brothers and sisters or brother and sisters, but not at all to the brothers and sisters of the testator or to any one or more of them, and the two words seem to me not of weight in the dispute.

The question I think is whether, as the testator's son had no issue, the title of William Hannam's children living at the time of the death of the survivor of the testator and his widow and son was made by the will to depend on any other circumstance than the fact of William Hannam not being alive at the time of the death of the survivor of the testator and his widow and son, and I conceive that it was not, and that William Hannam's children living at that time take under the will the same interest as they would have done if William Hannam had died in the interval between the deaths of the testator and the testator's wife,— a conclusion consonant \* in my opinion with principle alike \* 157 and numerous precedents, so far as precedents can be useful in construing such a document as this will. The cases or some at least of the cases cited during the argument were not by any means irrelevant, and the same may probably be said of others mentioned in *Key v. Key* (a) (decided by ourselves), in *Thompson's Case* (b) (decided by ourselves, affirming the opinion of the Vice-Chancellor Wood), and in *Sheppard's Case* (c), determined by the same distinguished Judge, three cases which appear to me to have been rightly decided, though there may have been more difficulty belonging to that of *Thompson* than I seem when it was

(a) 4 De G., M. & G. 78 [and cases in note].

(b) 5 De G., M. & G. 280 [and note.]

(c) 1 K. & J. 269.

before us to have thought. It was very different, however, from that now before the Court. My opinion is that to hold in favour of the heir-at-law here would be the very reverse of rendering words, as they ought to be, inservient to intention.

**THE LORD JUSTICE TURNER.** — What the effect of these dispositions might have been if the words “now living” had applied to the brothers and sisters of the testator, it is not, I think, necessary for us to decide. I am of opinion that those words apply only to the brothers and sisters of the wife, of whom the testator has expressly mentioned six to be living, and two to be dead. Assuming this construction to be correct, the case before us is the simple case of a devise to A. for life, with remainder to B., with a devise over if B. shall happen to die in the lifetime of A., and I take it to be perfectly settled that in such a case the devise over takes effect,

notwithstanding B. may have died in the lifetime of the testator. *Willing v. \* Baine*, (a) *Humberstone v. Stanton*, (b)

\* 158 and *Walker v. Main*. (c) I am of opinion, therefore, that the children of William Hannam became entitled, notwithstanding his death in the lifetime of the testator, and the decree must be altered accordingly. It will require alteration as well against as in favour of the appellants. Their costs cannot be given immediately, they must stand over with the costs of the other parties. I think the costs of all parties of the appeal should be costs in the cause.

#### DE SORBEIN *v.* BLAND.

#### TRITTON *v.* BLAND.

#### CUNLIFFE *v.* BLAND.

1858. February 23, 24. Before the LORDS JUSTICES.

B. died equitably indebted to A. After B.’s death, it was arranged between C., who was his executor and devisee, and A., that C., who admitted that he took under the devise real assets enough to pay B.’s debts, and that he was

(a) 3 P. Wms. 118. (b) 1 Ves. & B. 385. (c) 1 J. & W. 1.

liable to pay A.'s claim out of them, should not be called upon for immediate payment of the principal, but should pay interest on it. A. afterwards filed a bill to enforce payment either by C. or out of B.'s assets, and obtained a decree against C. personally for payment of the money due, which decree reserved further consideration and liberty to apply, but did not give any remedy against the assets. A suit was subsequently instituted by a mortgagee, to whom C. had mortgaged one of the devised estates, and the estate was sold in this latter suit.

*Held*, that A. had not, by obtaining a personal decree against C., lost her rights as a creditor against the assets of B., and that her claim against the surplus proceeds of the sale in the mortgagee's suit had priority over that of a judgment creditor of C., though the judgment was prior in time to the decree in A.'s suit.

*Sembler*, if necessary, A. might in her own suit, under the reservation of further consideration and liberty to apply, have enforced her claim against B.'s assets.

Whether the decree in A.'s suit was right in ordering payment by C. personally, *quære*?

THE question raised by this appeal was whether Mrs. De Sorbein, the plaintiff in the first suit, could still assert her rights as a creditor against the real estates of her deceased father, or had waived them and accepted in their stead the personal liability of his devisee.

\* By a settlement dated 29th December, 1791, made on \* 159 the marriage of Nathaniel Bland deceased (then Nathaniel Crumpe), a sum of 4000*l.*, Irish currency, was settled upon certain trusts for the husband and wife and the children of the marriage. This fund came to the hands of Nathaniel Bland deceased, who thus became indebted to the settlement, and died so indebted on 30th October, 1840. By his will dated 20th August, 1833, he, in exercise of a power in the settlement, appointed the whole of the trust fund to Mrs. De Sorbein, who was one of the children of the marriage, and he devised and bequeathed large real estates in England and Ireland, and his residuary personal estate, to his only son, the defendant Nathaniel Bland, whom he appointed his sole executor. By a codicil he gave to Mrs. De Sorbein's son Frederick 5000*l.*, which he charged on his real estates in Ireland. The defendant Nathaniel Bland was also the personal representative of the trustee of the settlement.

Mrs. De Sorbein by her bill stated, that soon after the testator's death, she applied to her brother, asking how the 4000*l.* was

invested, and that he in reply gave her no information, except that he was himself liable to pay it out of the property to which he had just succeeded, and he stated that it would not be convenient to pay it then, but that if she would leave it with him for the present, he would pay her interest at 5*l.* per cent upon it. She further stated, that she reposed great confidence in her brother, and trusted to his representation that the money was in his hands or to be paid by him, and agreed to his proposal.

The defendant Nathaniel Bland, for some time after the father's death, made regular payments to Mrs. De Sorbein at the \* 160 rate of 5*l.* per cent per annum on the \*amount of the trust fund, but before long began to make them very irregularly, and much correspondence between him and Mrs. De Sorbein took place with reference to her fortune. In one of his letters to her, dated 5th August, 1845, after expressing his regret that he could not make her a remittance, owing to the state of his Irish property, he said, " You will again ask how your fortune is in land ? I can only again say, that it could only be where my property was altogether. Even as a matter of strict business as a trustee, it was better in land as producing more." In a letter dated 7th January, 1846, he apologized for asking for a receipt, and concluded, " these things are necessary in business, and are proper for the trustees to be secured at any future day from claims, when, perhaps, all the persons on both sides may be no more." In another letter dated 23d June, 1846, he expressed himself as follows : " With respect to money matters, I am sorry not to be able to answer you in a way that will meet your expectations, as you do not quite seem to understand that the difficulty of raising capital for yourself is the same as with him " (referring to the plaintiff's son Frederick), " and that both your fortunes are circumstanced alike. You must be, however, aware that any money bearing interest must be invested in some security, and as yours and his are both similarly invested in land, the same thing applies to both. Your fortune, of course, is not lying at a banker's, it is only the interest which is drawn from them, from whatever I happen to have there at the time, or to place there for the purpose ; and without selling land, or raising it in some other way, which is not always practicable, I am quite unable to pay any thing but the interest to those persons whose fortune is charged

on the estate. Whatever you have already had advanced of capital I have been obliged to raise at some inconvenience on my own account."

\* Another letter dated the 23d of March, 1847, contained \* 161 the following passage: "It would be almost too long in writing to explain to you how the Irish sale is necessary for your fortune, but I will explain it when we meet. You might easily understand that though it is not settled on land it comes out of land with whatever other money I have, and if it was in English funds, you could not get the same interest for it." In another letter dated 24th February, 1848, the following passage occurred: "I had long ago endeavoured to explain to you how it happened that your fortune was so far identified with land as to be only produced from it. Although it was not settled by my father on land, but to be paid by me from any resources whatever which I might possess, yet as all my possessions are in land, the principal of your fortune is so invested also, otherwise I could not pay you 5*l.* per cent for it, which I should not be bound to do if it was otherwise invested; for example, if I merely did what a trustee would do, I should have put it in the funds, and then you would have received only 3*l.* per cent, that is, 120*l.* a year, instead of 200*l.*" Another letter dated 24th January, 1851, contained the following passage: "You would do very wrong and foolishly for your own interests to sell your fortune, for you would get but very little in proportion, and it would then all be gone. The effect in the mean time would be, that the people advancing money on it to secure themselves would put the whole Irish estate in chancery, which, though it would do me little harm, as I have none to spend out of it, would cause a suspension in the payments to Mrs. Sormain, and to Frederick, and also in your own especially, as it would be very difficult for strangers to know how to proceed at first. I trust all will be settled to your satisfaction in the end."

The defendant Nathaniel Bland at last insisted, that \* his \* 162 father had never received or become liable for the 4000*l.*, and that what he himself had paid in respect of it was only a matter of bounty. Mrs. De Sorbein thereupon filed her bill, showing how her father became liable for that sum, and how she became entitled to it, and alleging a contract by the defendant to pay as set out above. She adduced the above letters with others to the same effect, as evidence that the defendant and the estates

were liable, and prayed for a personal decree against the defendant for payment, and that, if necessary, it might be declared that the real and personal estate of Nathaniel Bland deceased were liable for what was due to her, and that all necessary accounts of those estates might be taken."

On 16th July, 1855, a decree was made, declaring the defendant personally liable to pay to the plaintiff what remained due in respect of the 4000*l.* and interest. Accounts were directed for the purpose of ascertaining what was due for principal and interest, the directions as to interest being somewhat special, and it was ordered that the defendant should pay to the plaintiff the principal which on taking the accounts should be found due, with her costs of suit, and further consideration was adjourned, with liberty to apply.

This decree was registered on 10th August, 1855, in the Common Pleas in England, the suit having previously been registered as a *lis pendens* on 10th August, 1854. The decree was also enrolled in England, that being necessary for the purpose of enrolling it in Ireland so that it could be enforced in that country.

At the time when the decree was made, the defendant was considered to be a man of large property, and the Court being \* 163 of opinion that there was ground for a personal decree against him, no remedy against the assets of his father was asked at the bar.

By certificate dated 12th December, 1855, the sum of 3012*l.* 6*s.*, Irish currency, was found due to Mrs. De Sorbein for principal, and 310*l.* 12*s.* 9*d.* for interest.

In June, 1855, the suit of *Tritton v. Bland* was instituted by the mortgagees of part of the defendant Nathaniel Bland's English estates devised to him by his father, seeking to enforce their security. In December, 1855, Mrs. De Sorbein was served with the amended bill in this cause to which she was made a party. On 30th May, 1856, a decree was made for sale, and for payment of what was due to the plaintiffs, with an inquiry as to the priority of the other incumbrances. Mrs. De Sorbein claimed under this decree to rank as a creditor of the testator Nathaniel Bland, but the chief clerk disallowed this claim, and gave her such priority only as she could claim as a judgment creditor of the defendant Nathaniel Bland, by virtue of the decree in *De Sorbein v. Bland*, dated the 16th of July, 1855, and registered 10th August, 1855.

The suit of *Cunliffe v. Bland* was a suit of a precisely similar nature to *Tritton v. Bland*, and on 8th July, 1856, a similar decree was made in it. The inquiries as to the priorities of the subsequent incumbrances were still pending, but the estate had been sold and the plaintiffs paid, and there was a large surplus in Court.

Another estate of the defendant Nathaniel Bland, called the Randall's Park estate, derived from his father, was sold by a mortgagee, and the surplus paid into Court under the Trustee Relief Act.

\* On 24th June, 1857, the cause of *De Sorbein v. Bland* \* 164 came on for further consideration, and an order was made for payment of the sums found due by the certificate of 12th December, 1855, for principal and interest, and of the taxed costs, and further consideration was adjourned, with liberty to apply.

On 22d July, 1857, the cause of *De Sorbein v. Bland* was heard again for further consideration, along with a petition by Mrs. De Sorbein in all three suits, and in the matter of the Trustee Relief Act, and along with the further consideration of *Tritton v. Bland*, and with a petition presented in *Cunliffe v. Bland* by Charles Gay and another incumbrancer, and a petition under the Trustee Relief Act presented by an incumbrancer on the Randall's Park estate. It is unnecessary to say more as to these proceedings than that the only material point calling for decision was, whether Mrs. De Sorbein was entitled to priority over Charles Gay, a judgment creditor of the defendant Nathaniel Bland, whose judgment was dated and registered on 14th June, 1854, a period prior to the decree in *De Sorbein v. Bland*, and to the registration of that suit as a *lis pendens*.

The Master of the Rolls stated his opinion to be, that the form of decree in *De Sorbein v. Bland* precluded Mrs. De Sorbein from relief as a creditor of Nathaniel Bland deceased; he held, also, on the merits, that she must be deemed to have elected to take her brother as having the funds in his hands as her trustee, and that she had thus lost all right as a creditor against her father's estate. His Honor considered, therefore, that her claims against the estate were only those of a judgment creditor of the son, and that Gay was entitled to priority, and, accordingly, on the petition in *Cunliffe v. Bland*, he ordered payment to Gay of a considerable sum out of the \* funds in Court, in part payment of his judgment debt, and in *De Sorbein v. Bland* he made an order \* 165

against Nathaniel Bland, for payment of subsequent interest and subsequent costs.

**Mrs. De Sorbein appealed.**

**Mr. Roundell Palmer and Mr. Smythe,** for the appeal.

**Mr. Elmsley and Mr. L. Mackeson,** for Bland.

**Mr. Follett and Mr. Hardy,** for Gay.

**Mr. R. Palmer,** in reply.

*Kinderley v. Jervis* (*a*) was referred to, as establishing that the right of simple contract creditors against real assets has priority over that of the judgment creditors of the heir or devisee, and *M'Carthy v. M'Carthy* (*b*) as to what might be done under the reservation of further consideration, the defendant having failed to comply with the decree for payment by him personally.

THE LORD JUSTICE KNIGHT BRUCE.—It has already been stated, that, in our opinion, it is most plainly established, that at the death of the father, he was, equitably at least, indebted to his daughter (the appellant) in the sum of 4000*l.* necessarily so often mentioned during the argument. If, therefore, nothing had taken place since the father's death to vary her position, or to create an alteration in her rights, of course she would be entitled to

\* 166 be paid the amount remaining \*due to her out of the assets

of the father in preference to those who claim merely as the creditors of the son, and not as purchasers from him, which is the position of Mr. Gay. But it is said, that, after the father's death, an arrangement was made between the brother and sister, the effect of which was that she was to accept the mere personal liability of her brother instead of the security which she had, that is the security of a creditor of the father upon the assets of the father,—an unlikely agreement to make, and one that, considering the position of the brother towards her, could only be established upon clear evidence that her rights were explained to her and understood by

(*a*) 22 Beav. 1.

(*b*) 1 Moll. 186.

her. No such evidence has been given. It has been contended, that the very statements in the bill show such an arrangement. Neither the bill, nor the evidence, I repeat, appears to me to show any such thing. What took place in effect was this: the brother said to her, "My father's property is liable to you for the debt. I have my father's property subject to your debt. It will not be a good thing for either of us that you should now enforce your claim. Leave things as they are, and I will pay you 5 per cent interest upon your money, upon your fortune, namely, 200*l.* a year." That, I agree, does not represent the exact words, and perhaps Mr. Hardy may think me as strong a commentator as I think him; but I cannot help considering, perhaps with undue partiality for my own explanation, that that explanation is nearer what is accurate than his. If so, there was no release, no discharge, but every thing between them was to remain, and did remain, as it was, she receiving from him 200*l.* a year, by way of interest at 5 per cent per annum.

It is said, however, that her bill in the cause (which is one of the matters before us) states the matter differently, and states in effect an election to take him as her creditor \* per- \* 167 sonally in lieu of any security, and asks only relief against the assets alternatively in the event, not of her not receiving payment, but in the event of her not establishing the brother's personal liability. I am of opinion that this is a very hard and unnecessary interpretation. I think it not only an unnecessary but an inaccurate interpretation, and that the true meaning of the bill is this: She asserted (accurately or inaccurately) that her brother had made himself personally liable to her independently of the amount of the assets, and independently of the existence of assets, but the bill also asserted her title against the assets; and the mere form of the bill, therefore, does nothing against her in my judgment.

The question upon the decree is, at first sight, more serious, because the decree gives her (correctly or incorrectly I do not say) her brother's personal liability. The decree has been enrolled, and cannot be questioned, at least here, and probably it can never be worth the while of any person to question it elsewhere. The decree gives her her brother's personal liability, and says nothing about the assets, directs an account to be taken, and orders him to pay; but it also reserves further consideration and liberty to apply; and though I believe it to be true that the decree is not

worded in an ordinary manner, it would, I conceive, be hard and unjust to interpret that decree as barring her from all relief against the assets, whether paid by her brother or not. In my opinion, the just construction of that decree (whether worded usually or unusually) is to hold that it left her claim upon the assets as it was, for the amount (if any) which she might not receive from her brother. She is therefore at this moment, as it appears to me, a creditor upon the father's estate for so much as she has not received of the principal and interest of the debt due (as I

have said) from her father, a claim preceding the rights  
 \* 168 \* of the judgment creditors of the son, who are not pur-

chasers from the son, against that real estate of the son which had been part of the real estate of the father. But she does not seem to be entitled to any better right than any other unpaid creditor of the father, if there is any unpaid creditor of the father, and it will be for Mr. Bland (represented by *Mr. Elmsley*) to say whether he desires any inquiry as to the existence of any other debt of the father. If he does not desire it, or there is no other debt of the father, then the fund (sufficient for the purpose, as I apprehend) which is under the control of the Court, must, so far as necessary, be applied to the payment of this lady's most just demand.

THE LORD JUSTICE TURNER.—This case at first appeared to me to present very great difficulties, but the difficulties which I felt have been in a great degree removed. Upon the evidence before us, we are bound, I think, to assume that the testator, Nathaniel Bland, in some manner became liable for the sum of 4000*l.*, which formed the subject of the marriage settlement.

Then the question is whether that debt has or has not been discharged so far as the estate of the testator Bland is concerned? There are two modes in which it is said to have been discharged; first, by contract between the plaintiff and the devisee of Mr. Bland's estate, under which contract it is said that the plaintiff agreed to take the personal liability of the devisee; and secondly, by the decree in the cause, in which cause the plaintiff actually obtained a decree against the devisee personally.

With reference to the question of discharge by contract  
 \* 169 between the plaintiff and the devisee, there has been \* a great deal of argument upon the allegation of this bill.

The allegation in the bill is that the plaintiff being entitled to this 4000*l.*, applied to the devisee Bland to know where her fortune was, and the bill states "that the defendant, in reply to her application, gave her no information whatever beyond the fact that he assured her he was himself liable to pay her the said sum of 4000*l.* out of the property to which he had just succeeded" (he, having become devisee of all his father's estate, had become liable for the 4000*l.*). "He further stated to her that it would not be convenient for him at that time to pay her the said sum of 4000*l.*, but he told her that if she would leave the said money with him for the present he would pay her interest at five per cent upon it, which he said would give her a larger income than she would receive if the money were to be invested in the funds. The plaintiff reposed great confidence in the defendant, and trusted to his said representations that the said money was in his hands or to be paid by him, and agreed to his said proposal."

The first thing observable upon these allegations is that although the bill says he assured her that he was himself liable to pay, the assurance as stated is not confined to his personal liability to pay, but extends to his liability to pay "out of the property to which he had just succeeded." What therefore that passage really means is this: that he said to the plaintiff, "I have taken property out of which I am liable to pay the debt." Then the bill goes on to say that he stated that it would not be convenient for him at that time to pay her the 4000*l.*, but that if she would leave the money with him he would pay her interest at five per cent. That is argued upon as if it were a contract by her to leave the money with him, but of course it must be read with reference to what had passed in the previous part of the conversation. She \* was to leave \* 170 the money with him which was payable out of the property to which he had just succeeded; that is, to leave the money with him upon the security of the estate on which the money was charged.

Then the allegation goes on that she trusted to his representations that the money was in his hands, or to be paid by him, and agreed to his said proposal; and, looking to what had passed before, I understand that passage as meaning merely that there was an agreement between him and her that the money should remain in his hands as a charge upon the estate. Now does the correspondence, or does it not, bear out that interpretation? It

seems to me very distinctly to bear it out. The letter of the 5th of August, 1845, says: " You will again ask how your fortune is in land ? I can only say that it could only be where my property was altogether ; " that is to say, I have got that land upon which your fortune is charged. Then, again, in the letter of the 23d of June, 1846, which is more strong, we find this : " I am sorry not to be able to answer you in a way that will meet your expectations, as you do not quite seem to understand that the difficulty of raising capital for yourself is the same as with him " (meaning the plaintiff's son Frederick), " and that both your fortunes are circumstanced alike." Now Frederick had an undoubted charge under the codicil upon the real estate. Then what is the meaning of this statement, but that she also had such a charge, — an interpretation which it is perfectly clear was intended, because he says in the latter part of the letter, " I am quite unable to pay any thing but the interest to those persons whose fortune is charged on the estate." So that when applied to for payment on account of the 4000*l.*, he says, " I can pay nothing but the interest to those parties whose fortune is charged on the estate ; your fortune is charged on the estate, and I cannot do \* more than pay you interest upon it." So far, therefore, as the case of contract goes, it seems to me to be wholly untenable.

\* 171 Then it is said, on the part of the judgment creditor, that the decree made in the appellant's suit has discharged the estate ; but I do not see how the decree, although it is personal against the devisee, could discharge the estate. Take the common case of a creditor filing a bill for the administration of personal estate. The executor puts in his answer, and admits assets ; the creditor takes a personal decree against the executor ; the executor becomes insolvent, and the creditor cannot recover payment from him, but there is a large outstanding estate, it may be 100,000*l.* due on mortgage to the testator's estate. Could it be contended that the fact of the executor having put in an answer admitting assets, and of the creditor having taken a personal decree against the executor, could discharge the debt which was due from the testator's estate, or prevent its being recovered against the outstanding personal estate of the testator ? Would it not be a matter of course to appoint a receiver of the outstanding estate, upon a bill being filed for that purpose ? It seems to me, therefore, that the decree certainly could not operate to discharge the estate ; nor, as I

think, could the subsequent proceedings under the decree for the purpose of recovering the debt against the estate of the devisee have any such operation. According to the decree (whether right or wrong in this respect is not before us upon this appeal, and is a point therefore on which I give no opinion) the devisee had rendered himself personally liable for the debt, and the proceedings against him for enforcing that liability could not discharge the estate, as it was perfectly consistent with his being personally liable for the debt that the estate should remain liable for it also.

\* The question then comes to this, there being a debt \* 172 to be enforced against the estate, not discharged by virtue of any contract with the devisee, and not discharged by virtue of the decree, how is the payment of it to be enforced? But for the special circumstances of this case I should have felt some difficulty upon that point,— I mean upon the question how we were to deal with the cause instituted by the plaintiff. Perhaps, having regard to the terms of the last order in that cause, which contains a direction for payment, with a reservation of further directions, and liberty to apply, we might have directed inquiries as to the real estates, the reservation of further directions importing that something more was to be done if the payment, which would not itself be the subject of further directions, but would be to be enforced by an attachment, should not be made. I am rather disposed to agree with my learned brother, that we might have directed such inquiries, but it is not, I think, necessary to decide the point, for this case comes before us upon appeal from two orders, and one of those orders is an order for the payment to the judgment creditor of a sum of 4292*l.*, proved to be the surplus proceeds of one of the devised estates, after the payment of mortgages created by the son. As against the mortgagees the plaintiff of course has no claim, but as against the surplus she has a claim as part of the assets of the father. We have here, therefore, a fund for payment of the debt, and *Mr. Elmsley*, on the part of the executor and devisee, not desiring any inquiry as to other debts, we have a case in which there is a debt for which the estate is liable, and a fund for the payment of it. It seems to me, therefore, that that fund ought to be applied in payment of the debt, and that we need not embarrass ourselves with any question as to what could have been done under the decree which was made in the original suit

\* 173 instituted by the appellant for the recovery of the \* debt.

I think the proper course is to discharge the order which was made upon the petition in the two causes for the payment to Mr. Gay, and to direct that he bring back into Court what may have been paid to him, and to order payment thereout of this debt due to the appellant.

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### CLEMENTS v. HALL.

1857. November 3. Before the LORDS JUSTICES.

1857. December 14. 1858. February 25. Before the Lord Chancellor Lord CRANWORTH and the LORDS JUSTICES.

W. H. and A. H. worked a mine in partnership under a lease which expired in 1845, and then as tenants from year to year till 1847, when W. H. died, leaving a will, by which he appointed M. H. executrix, and gave certain interests in the mine to H. F. H. A. H., after the death of W. H., remained in possession, claiming to be solely entitled to the mine and plant, and though M. H. made frequent applications to him for an account, he refused to render any. In 1850, notice to quit in March, 1851, was served by the landlord on A. H., who, about the latter period, agreed with the landlord for a new tenancy of the greater part of the mine, on terms much more burdensome than those of the old tenancy. At the death of W. H. the mine was barely kept going, and was producing no profits, and things had remained in much the same state till March, 1851. No notice was given to M. H. of the negotiation for the new tenancy under which A. H. remained in possession and incurred considerable outlay. In November, 1851, H. F. H. filed a bill against M. H. and A. H. to establish his title to an interest in the mine. M. H. put in an answer admitting his title. A. H. did not answer, but obtained an order for security for costs, and the suit was not further prosecuted. A. H. died intestate in December, 1853, and M. H. became his personal representative. The plaintiff, in 1854, took an assignment of the interest of H. F. H., and filed his bill in the nature of a supplemental bill to the former bill, to have the interest of W. H. in the mine secured for his benefit.

*Held*, by the Lord Chancellor and the Lord Justice TURNER (the Lord Justice KNIGHT BRUCE doubting), that the equity of the persons claiming under W. H. to have the benefit of the renewal by A. H. of the tenancy was not displaced, and that the estate of W. H. had a continuing interest in the mine.<sup>1</sup>

<sup>1</sup> See Clegg v. Fishwick, 1 Mac. & G. 298, note (1); 1 Lindley Partn. (Eng. ed. 1860) 548.

Per the Lord Chancellor, the doctrine of *Prendergast v. Turton*, 1 Y. & C. C. C. 98; 13 L. J. (N. S.) Ch. 268, does not apply where a surviving partner has refused to give the representatives of a deceased partner all the information as to the state of the concern which is necessary to enable them to exercise a sound discretion as to whether they should claim an interest in and take a share of the risks of the concern.<sup>1</sup>

THIS was a motion by the plaintiff, by way of appeal from a decision of the Master of the Rolls affirming the conclusion at which his Honor's chief clerk had arrived, that the interest of Walter Hall, the testator in the cause, in a mine called the Settlingstones mine ceased upon his death.

The Settlingstones mine had been formerly worked by the testator Walter Hall, in partnership with Alfred \* Hall and \* 174 Richard Puller, being held by them under a lease from the Duke of Northumberland, which expired in the year 1845. Mr. Puller died before the expiration of the lease, and there did not appear ever to have been any claim on the part of his representatives in respect of his interest in it. After the expiration of the lease, Walter and Alfred Hall continued to occupy and work the mine in partnership as tenants from year to year until the death of Walter Hall.

Walter Hall died on the 14th of November, 1847, having by his will dated the 20th of April, 1839, appointed his sister, the defendant Matilda Hall, his executrix, and left to her all bills, moneys, debts owing to him at home and abroad, and all other property of every kind of which he might be possessed at the time of his death, with the exception of what he thereafter specifically disposed of. After certain specific dispositions, the testator proceeded thus: "I also leave to my sister, for her life, my half of the mine at Settlingstones, which I hold jointly with my brother Alfred, and of the mining property at it, and my half of any other mines which I may have jointly with my said brother at the time of my death; and, after her death, I leave my half of the 1440 shares in the Derwent mines, of the mines and mining property at Settlingstones, and of any other mines as above to my son Henry Foley Hall. I charge my half of the Derwent mine shares, and of Settlingstones and other mines, with an annuity of 300*l.* per annum to my wife Margaret Hall for her life, and in the event of

<sup>1</sup> See 2 Lindley Partn. (Eng. ed. 1860) 762 *et seq.*; *Clegg v. Edmondson*, 8 De G., M. & G. 787.

her death, I then direct 200*l.* a year to be paid to my daughter Augusta Foley Hall for her life, and the remaining 100*l.* a year to be paid to my son Henry Foley Hall." This will was proved by the defendant Matilda Hall on 26th November, 1847.

\* 175 \* After the death of Walter, Alfred continued to work the mine alone, but only so far as was necessary to keep it going. Matilda Hall, as representative of Walter, constantly claimed an interest in it, and asked for accounts; but Alfred claimed to be entitled to the whole of the mine, with the plant, and refused to render any account whatever. Matters continued in this state till 24th September, 1850, when the Duke of Northumberland served on Alfred a notice to quit the mine at Lady-day, 1851, alleging that it was not worked with adequate capital. Before Lady-day arrived, or soon afterwards (for the exact date did not appear), Alfred entered into a negotiation with the Duke, and obtained from him an agreement for a new tenancy of the greater part of the mine, on the terms of paying an annual rent of 500*l.* certain, besides royalties, and on an undertaking to apply a larger amount of capital in working the mine, and on the condition that he should, before the lease was granted, work the mine to such an extent as to show that he intended to carry on the working effectually. On this new agreement, Alfred worked the mine on his own sole account, except the part omitted from the new tenancy, such part being surrendered to the landlord. No lease, however, was granted. It did not appear that Matilda had any notice of this negotiation, or of the new tenancy.

In the month of November in that same year, 1851, Henry Foley Hall, who had, upon the death of Margaret Hall in 1848, become entitled in possession to the annuity given him by the will of Walter and charged on Walter's interest in the mine, filed his bill in this Court against the present defendant Matilda Hall, as executrix of Walter, and against Alfred Hall, praying that an

account might be taken of what was due to him in respect \* 176 of the annuity of 100*l.*, and that what should be \* so found

due might be decreed to be paid to him by Matilda Hall, together with interest, and that the annuity might be secured to him under the direction of the Court, and that an account might be taken of the freehold and leasehold estates, and of the mines and mining shares of the testator, devised or bequeathed to Henry Foley Hall in remainder, or charged for his benefit, and of the

mining and other plant thereon, or relating thereto, and the incumbrances affecting the same at the decease of the testator, and that the entire interests of Henry Foley Hall, under Walter's will, might be ascertained and secured under the direction of the Court, and that, if necessary, an account might also be taken of the rents and profits of such freehold and leasehold estates and mines and mining shares which had come to the hands of Matilda Hall and Alfred Hall, or either of them, or to the hands of any other person or persons by their order or for their own use, and of the application thereof, and that certain estates at Arkindale and Derwent, or such parts thereof as had not been sold as therein mentioned, and (if necessary) the other freehold and leasehold estates of the testator might be sold under the direction of the Court, and the proceeds applied and secured according to the trusts of the will. The bill further asked for an injunction and receiver as to the estates at Arkindale and Derwent, and that (if necessary) the mines at Settlingstones and elsewhere, charged with the annuity of 300*l.* as thereinbefore mentioned, might be worked under the direction of the Court, and that if Matilda Hall did not admit assets sufficient for the payment of the debts and funeral and testamentary expenses of the testator other than such parts of the personal estate as were charged with the annuity, then that the personal estates of Walter might be administered by the Court, with all proper directions.

\* The defendant Matilda Hall appeared to and put in her answer to the bill thus filed by H. F. Hall, and by that answer she admitted that the defendant Alfred Hall continued in possession of the Settlingstones mine after the death of Walter Hall, and she said that she had frequently applied to him for an account of the profits of the mine, but that he declined to render such account, and claimed the rents and profits as his own property, and in fact had never rendered any account thereof. By this answer, however, Matilda Hall distinctly admitted the title of the plaintiff H. F. Hall to the testator's share in the Settlingstones mine. The defendant Alfred Hall also appeared to the bill thus filed by H. F. Hall, but he put in no answer to it, having obtained an order to stay the proceedings until security was given for the costs, and nothing further was done in the suit. Alfred continued to work the mine till 31st December, 1853, when he died intest-

tate, and the defendant Matilda Hall became his personal representative.

By an indenture dated the 1st June, 1854, H. F. Hall assigned to the plaintiff B. Clements all his interests under the will of Walter Hall ; and on the 17th of June, 1854, the plaintiff filed the bill in this cause against the defendant Matilda Hall, alleging, amongst other things, that the mine at Settlingstones and certain other mines, and the mining and other plant attached thereto respectively, belonged to the testator Walter Hall and Alfred Hall in undivided moieties ; and that they had long been, and at the decease of the testator still were, partners in such mines, and engaged as partners in the working thereof; that after the decease of the testator the mines were managed and worked with the plant aforesaid, and with capital one moiety of which belonged to the estate of the testator, and that the profits of the mines

\* 178 were received by Alfred Hall during his life as to \*one moiety thereof on his own account, and for his own benefit, and as to the other moiety thereof, to which and the profits whereof the testator's estate was entitled, on account of and for the benefit of such estate and of the persons interested in such mines under Walter's will, and that the last-mentioned moiety was so managed and worked, and the profits thereof were so received by Alfred Hall, with the knowledge and sanction, and as the agent of Matilda Hall. That since the decease of Alfred Hall the mines had been managed and worked with the plant and capital aforesaid, and the profits of them received by Matilda Hall. That the mines had not since the decease of the testator been worked in a proper or efficient manner, but to the detriment of the plaintiff. That the moiety to which the testator's estate was entitled of the profits of the mine at Settlingstones and other mines was in every year subsequently to his decease considerably more than sufficient for payment of the annuities charged thereon by his will, and that the greater part of such moiety was duly paid and accounted for by Alfred Hall during his life to Matilda Hall, but that part was not so paid or accounted for ; and the plaintiff submitted that Matilda Hall ought to have required and compelled Alfred Hall to pay and account for the same to her, and that Matilda Hall ought to be charged on the footing of wilful neglect and default for not having done so ; and that she ought to set forth an account of the

mines and mining property, and the mining and other plant attached thereto, and of the working of the mines and the produce and profits thereof in every year since the testator's decease. The object of the bill was to have the arrears of H. F. Hall's annuity paid to the plaintiff, and to have the other interests given by the will of Walter Hall to H. F. Hall secured for the plaintiff's benefit; and it prayed, among other things, for the appointment of a receiver and manager of the Settlingstones \* mine, and \* 179 asked that the bill might be taken as a supplemental bill to that in *Hall v. Hall*.

The defendant Matilda Hall by her answer to this bill stated to the following effect: That Walter Hall and Alfred Hall had not sufficient capital to work the Settlingstones mine, and that there had been no profit from it at the period of Walter's death. That, after Walter's death, Alfred, as surviving partner, continued in possession of the mine and worked it for his own benefit, but only to such an extent as to keep the mine going. That on the 24th September, 1850, the landlord's agent served a notice to quit on Alfred Hall, and that the tenancy of the mine was determined at Lady-day, 1851. That Alfred Hall then proposed to take a new lease, and an agreement was come to, under which he took possession upon the terms of working to such an extent as to prove that he intended effectually to carry on the mine. That he became yearly tenant accordingly, and laid out money in such a manner as to entitle himself to a lease, but that at Lady-day, 1855, a further notice to quit was served, which was still pending. She insisted by the answer that the partnership determined on the death of Walter Hall, subject to Alfred Hall's accounting for Walter's share, and if not she claimed to be entitled against the estate of Walter to a moiety of Alfred's expenditure. She also said that Alfred in his lifetime insisted that he was entitled to the whole of the mine, and that since his death she had worked it for her own benefit.

By the evidence in the cause it appeared that, in consequence of the notice to quit served in the year 1855, a further arrangement had been made with the Duke of Northumberland, under which the defendant Matilda \* Hall was in possession at \* 180 the time when the cause came to a hearing.

On 9th July, 1855, the Master of the Rolls made in this suit a decree for the administration of the estate of Walter Hall, direct-

ing, among other things, an inquiry of what the testator's interest in the several mines and mining property and shares in the pleadings mentioned consisted at the time of his death, and how the mines had been worked, and by whom the profits, if any, in respect of the testator's interest therein had been received, and whether the testator's interest in any of the said mines, mining properties, and shares, or any of them, or in any part thereof, had ceased or determined ; and, if so, how.

The certificate of the chief clerk, dated 24th April, 1857, was, so far as regards the Settlingstones mine, as follows : "The testator's interest in the mine at Settlingstones ceased upon his death, the partnership between him and the said Alfred Hall having become dissolved by the death of the said testator, and the said mine thereby became the sole property of the said Alfred Hall as the surviving partner, subject to his accounting for the testator's capital therein at the time of his death."

An application was made to the Master of the Rolls to vary this certificate. His Honor considered, however, that the right of the persons claiming under Walter to any interest in the mine had been lost by delay and acquiescence, and he therefore refused the motion with costs ; but on the same day the certificate was amended by his Honor's direction, and as amended stood as follows : "The testator's interest in the mine at Settlingstones ceased upon his death, and the said mine then became the \*181 sole property of the said Alfred Hall, subject \* to his accounting for the testator's capital therein at the time of his death, and the profits produced by the use thereof by the said Alfred Hall." The plaintiff appealed from the order refusing the motion to vary the certificate. The appeal came on to be heard before the Lords Justices on 3d November, 1857.

*Mr. Roundell Palmer* and *Mr. Kent*, for the plaintiff.—The Master of the Rolls thought the case was governed by *Norway v. Rowe* (a) and *Prendergast v. Turton*. (b) Were it not for that the plaintiff's right would be clear. *Clegg v. Fishwick*. (c) But it requires a much stronger case to make out acquiescence or abandonment against a personal representative, whose duty it is

(a) 19 Ves. 144.

(b) 1 Y. & C. C. C. 98 ; S. C. on appeal, 13 L. J. (N. S.) Ch. 268.

(c) 1 Mac. & G. 294.

to preserve the estate, than against a beneficial owner, who may do what he likes with his own. The case is more like *Hart v. Clarke*, (a) for the testator actually had an estate in the mines at his death, and his equitable estate in them continued after his death. *Clegg v. Edmondson* (b) was a case of very gross delay, and there an express notice was given by the continuing partners that they were going to obtain a new lease of and carry on the mines for their own benefit. Here the tenancy was renewed without communication with Matilda; and, moreover, there was a general refusal by Alfred to account,—a refusal as to matters in respect of which he was clearly liable to account: he did not give her the information he was bound to give, and which was necessary in order to enable her to come to a conclusion as to the course which it would be prudent for her to adopt as to the mining property. The doctrine of *Norway v. Rowe* and *Prendergast v. Turton* cannot apply where the party seeking to avail himself of it has refused the information which he was bound to give. The mere fact that the mines were worked at Alfred's sole expense is by itself nothing; a man's property is not to be transferred to another merely because he has omitted to do something with respect to it which he ought to have done. *Drysdale v. Piggott*. (c) Matilda Hall cannot be permitted, as Alfred's personal representative, to recede from what she said in her answer in the former suit in the character of Walter's personal representative. *Stanton v. Perceval*. (d)

[THE LORD JUSTICE KNIGHT BRUCE.— Could you read against an assignee in bankruptcy an admission made by him before the bankruptcy ?]

We submit that we could, on the analogy of *Beasley v. Magrath*, (e) as to a matter of fact.

*Mr. Selwyn* and *Mr. Karslake*, for Matilda Hall.— There is no ground for contending that the rule applied in *Norway v. Rowe* and *Prendergast v. Turton* is inapplicable to an executor. The beneficial effect of the rule would be destroyed by such an exception. In *Clegg v. Edmondson* several of the claimants who were barred

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| (a) 6 De G., M. & G. 232.                      | (b) 3 Jur. (N. S.) 299.   |
| (c) 4 W. R. 773, L. J. [8 De G., M. & G. 546]. |                           |
| (d) 5 H. L. Cas. 257.                          | (e) 2 Sch. & Lef. 31, 34. |

were executors. Every circumstance on which the Court relied in that case exists here. If this claim is allowed it will be necessary to go back and take into account the title of Puller, who died before 1845. The parties here were at arm's length almost immediately after Walter's death.

[THE LORD JUSTICE TURNER. — May it not be necessary for you to make out that there was an abandonment before 1851? Ever since that time there has been a bill on the file.]

If that be necessary to be made out, we do make it out. The claim of Alfred to hold in his own right was well known to \* 183 Matilda; he took a \* new lease from the duke on terms much more burdensome than those of the old one, but she never offered to take a share of the burden. There was considerable outlay under the new letting; she let Alfred bear it all. She was not bound to enter into partnership with Alfred; she had an option, which she might exercise, and she must be taken to have declined to enter into it. It is true that the lapse of time here was not so great as in *Clegg v. Edmondson*, but no strict calculation as to time is to be made in such cases. The question is, was there expenditure by one party, the other lying by. The suit instituted in 1851 does not alter the case; a party claiming such a right as the present must offer to contribute to the expenses of the undertaking: Henry Foley Hall did nothing of the sort. Moreover, a suit not prosecuted cannot be considered to have any effect in a case depending, not on the Statute of Limitations, but on delay and acquiescence. That Alfred claimed to retain the plant does not alter the case, the same circumstance occurred in *Clegg v. Edmondson*; that the right to a share of the plant has not been lost does not save the right in the mine. In *Clegg v. Edmondson* there were uniformly large profits and no losses, which furnished a plausible argument against the application of the principle of *Prendergast v. Turton*. Here there were no profits at the time of Walter's death; and Matilda, in abandoning all claims to the mine, did only what any person not inclined to speculation would have done. *Hart v. Clarke* turned to a great extent on the legal title of the plaintiff, but there is no such title here.

Mr. Kent, in reply.

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Their Lordships reserved judgment, and on 14th December \* the case was put in the paper to be argued before the \* 184 full Court by one counsel on each side.

*Mr. Roundell Palmer*, for the plaintiff.—In *Norway v. Rowe* (*a*) the old interest had *prima facie* been determined by the re-entry; the only claim was in respect of a sort of right to follow the goodwill. Lord ELDON held this equity to be rebutted by the time which had elapsed after actual abandonment and after expenditure by the parties who claimed under the new title. *Clegg and Edmondson* is similar; the delay and lying by were excessive: it was a clear case.

[THE LORD JUSTICE KNIGHT BRUCE.—I did not think it so. In my opinion it was a strong decision, though I am still disposed to think it a correct one.]

In *Prendergast v. Turton* (*b*) the unsuccessful party had led everybody to suppose that he had acquiesced in the forfeiture. *Hart v. Clarke* (*c*) is in our favour, and resembles the present case much more than any of those relied on against us. It takes more to displace the interest of a deceased partner in the assets of the partnership than to defeat a constructive trust attaching on property acquired under a new legal title. Here, till Lady-day, 1851, there was no change in the old tenancy, and in November, 1851, H. Foley Hall's bill was on the file. If this case is decided against the plaintiff, it will come to this, that there is a survivorship in equity as to partnership property, unless the representative of the deceased partner makes a claim within a short time. Here, during four years, the executrix demanded accounts from the surviving partner, and at the end of that period a bill was put on the file. The certificate is suicidal in declaring that the \* interest in the mines ceased at Walter's death, while it \* 185 treats the right to the rest of the partnership property as subsisting.

(*a*) 19 Ves. 144.

(*b*) 1 Y. & C. C. C. 98; S. C. on appeal, 13 L. J. (N. S.) Ch. 268.

(*c*) 6 De G., M. & G. 282.

*Mr. Selwyn*, for Matilda Hall.—At the time of Walter's death the mine produced no profits, was really of no value, and was virtually abandoned. It would not have been a prudent step in Matilda to burden herself with a share in it, and her acts showed that she did not intend to do so. The question is, was this claim good against Alfred in his lifetime; if not, the accidental union of characters in Matilda cannot make it good now. The claim would not have been good against Alfred; he could have contended successfully that there was either an intention of abandonment, or of lying by to see whether the mine, when worked at his risk, would turn out prosperous. H. Foley Hall's bill does not help the plaintiff's case. Alfred was never put into a position to ask any one for contribution to the expenses, and the suit moreover was never prosecuted. The filing it amounted, in substance, to making a claim without attempting to enforce it, as the plaintiffs in *Clegg v. Edmondson* had done, and this was held to make their case worse rather than better.

*Mr. R. Palmer*, in reply.—Contribution to the expenses was never asked for. During three years and a half after the testator's death the old title remained undisturbed, and the mine was not actively worked; so there were no material expenses. The transaction of March, 1851, was something to put the parties at arm's length; but it does not appear that Matilda knew of it. She does not show any knowledge of it in her answer filed in 1852 in *Hall v. Hall*.

Judgment reserved.

1858. February 25.

\* 186      \*THE LORD CHANCELLOR.—The general rule of law is, that on the death of a partner, in the absence of express stipulation, his representative is entitled to have the whole concern wound up and disposed of, and if the surviving partner continues the trade, the representative of the deceased partner may elect to take his share of the profits, or may charge the survivor with interest on the amount of the capital retained and used by him.<sup>1</sup>

<sup>1</sup> See Collyer Partn. (5th Am. ed.) §§ 130, 324 and note, 335 note.

If the property of the partnership consists in part of leaseholds, the representative of the deceased partner may treat the survivor as a trustee, and if the survivor renews the lease, he is considered to do so for the benefit of the partnership.<sup>1</sup>

This rule, however, has been to some extent departed from where the trade is one of a speculative character, and requiring great outlay with uncertain returns. There, if the surviving partner renews the lease in his own sole name, and carries on the business with his own capital and in his own name, the Court will not in general assist the representative of the deceased partner unless he comes forward promptly, and is ready to contribute a due proportion of money for the purpose of the business. It would be unjust to permit the executor of the deceased partner to lie by and remain passive while the survivor is incurring all the risk of loss, and only to claim to participate after the affairs have turned out to be prosperous. This is the general principle, which is clear enough, but the application of it to particular cases is often difficult.

[His Lordship then after concisely stating the facts of the case, and the decision of the Master of the Rolls on the point now in question, proceeded as follows :] —

\* That Alfred had no right to retain to himself the old lease, and to obtain a renewed lease for his own benefit, if Matilda, as executrix of her deceased brother, properly interposed, is a matter admitting of no doubt, and the only question therefore is, whether she did all which it was incumbent on her to do for the purpose of asserting and preserving the rights of those claiming under Walter.

On the part of Alfred it is argued, that no effectual step was taken by the defendant Matilda, as Walter's executrix, during the six years and upwards which elapsed between the death of Walter in November, 1847, and that of Alfred in December, 1853, and so that she must be considered to have abandoned all right as representing the deceased partner, to have thought it would not be prudent to concur in the risks which attend the working of a mine, and that it cannot be allowed to those claiming under Walter,

<sup>1</sup> See Parsons Partn. 231, 441.

now, when the speculation has proved successful, to assert a right which was not claimed when its benefits were in doubt. This was the view of the case taken by the Master of the Rolls ; but, with all respect to his authority, I cannot concur in it.

If the evidence had shown that Matilda had during the life of Alfred remained passive, and, without making any adverse claim, had allowed him to obtain a new lease and to incur the risk of large expenditure, knowing that he did so in the belief that he was acting for himself alone, then the principle on which (as I understand) the decision was founded might have been applicable. But here Alfred, by his conduct, precluded himself from setting up any such case.

The defendant Matilda, in her answer to the bill filed by \* 188 Henry Foley Hall in November, 1851, states \* that Alfred,

who had ever since his brother's death been in the possession and management of the mine, had always refused to comply with her repeated applications to him to render an account of the rents and profits of the mine. Now, though I accede to the proposition, that the representative of a deceased partner in a mining concern may forfeit his right to the profit made by subsequent workings of a new lease taken by the survivor, if he does not with reasonable expedition come forward and contribute to the outlay, yet this doctrine can never apply to a case where the survivor keeps the representative of the deceased partner in ignorance of the real state of the concern. He is bound to disclose *uberrimā fide* every fact which may enable the representative to exercise a sound discretion as to the course he ought to pursue. And here the defendant states, that Alfred, up to a period long subsequent to his obtaining the renewed lease, refused to furnish her with any accounts of the mine, and so kept her in ignorance of all which might be necessary for enabling her to decide on the propriety of insisting on her equitable right to be treated as a partner. On this short ground, I think that the certificate of the chief clerk was wrong, and that it ought to be varied by stating that the testator's interest in the Settlingstones mine did not cease upon his death.

THE LORD JUSTICE TURNER.—The general principle to be applied to the determination of this case admits, and can admit, of no dispute. The partnership did not determine by the death

of Walter Hall, so as to entitle Alfred Hall to Walter's share of the mine. The share, indeed, became legally vested in Alfred, but it was affected by a trust, or *quasi* trust, for the benefit of Walter's estate.<sup>1</sup> This trust, or *quasi* trust, \* draws with \* 189 it the benefit resulting from the possession held by the person who is affected by it, and every renewed interest therefore becomes subject to the trust, or *quasi* trust, unless it has been effectually determined. The question we have to consider in this case is, whether it has been so determined, and I am of opinion that it has not. It is, in my judgment, most important to adhere to the rule of the Court, which subjects property acquired by means of a confidential relation to the trusts, or *quasi* trusts, which attached to the interests by means of which it was acquired; and although I agree that this rule has been, and ought to be, modified in the case of mines and other property of a doubtful and speculative character, and that the Court is bound in such cases to look carefully into the conduct of the parties who claim the benefit of the acquisition, with a view to the question whether they may not by their conduct have raised a counter equity sufficient to defeat their claim, I think that the grounds brought forward for defeating the claim ought in all cases to be watched with jealousy, the more so as it is always in the power of the Court to dictate the terms on which the claim shall be admitted. This, in my opinion, ought to be the rule in all cases of this nature, but more especially in a case like the present, where the acquisition has been made without any communication with the parties interested under the trust or *quasi* trust. The intention to acquire the property in question under the arrangement of 1851 does not appear upon the evidence before us to have been communicated even to the defendant Matilda Hall, and I think that the circumstances of this case furnish no sufficient grounds for displacing the equity of the parties interested under the will of Walter Hall. It is alleged by the answer of Matilda Hall in this suit that there were no profits of the mine before the death of Walter Hall, and that after his death Alfred Hall worked the mine only \* to such an \* 190 extent as to keep it going. This, I think, is a sufficient excuse for Matilda Hall not having filed a bill at any time between the death of Walter Hall and Lady-day, 1851, and ever since

<sup>1</sup> See Parsons Partn. 281, 441.

November, 1851, there has been a bill upon the files of this Court claiming the right which is now insisted upon. Under these circumstances I think it would be going much too far to say that the equity claimed by the plaintiff has been displaced, and, in my opinion, therefore this order ought to be reversed, and it ought to be declared that the testator's interest in the mines at Settling-stones did not cease upon his death, but is still continuing, of course leaving the terms on which the plaintiff is to have the benefit of it to be settled hereafter.

THE LORD JUSTICE KNIGHT BRUCE. — This case appeared to me at the close of the first argument (as I then said), and still appears to me, one of nicety and difficulty; but the inclination of my opinion being rather in accordance with the conclusion of the Master of the Rolls than otherwise, I am unable to give a voice for disturbing his decision. The order of the Court will of course, however, be according to the united opinion of the Lord Chancellor and the Lord Justice TURNER.

In the Matter of TILDEN SMITH, JAS. HILDER, GEORGE SCRIVENS and FRANCIS SMITH, Bankrupts.

1857. December 22. Before the LORDS JUSTICES.

An additional signature to a promissory note, placed there some years after the date of the note, which was payable on demand: *Held*, not an alteration rendering the note void, but an addition in the nature of an indorsement, although on the face of the note.<sup>1</sup>

<sup>1</sup> If a third party signs a note payable on demand, as surety, some months after its execution by the original promisor and delivery to the payee, and for a new consideration, this is a new and independent contract, not requiring the consent of the original promisor. *Stone v. White*, 8 Gray, 589; see *Story Prom. Notes* (6th ed.), § 408 a; *Bowers v. Briggs*, 20 Ind. 139; *Gardner v. Walsh*, 5 El. & Bl. 83; *Hughes v. Littlefield*, 18 Maine, 400; *Powers v. Nash*, 37 Maine, 322; *Peake v. Dorwin*, 25 Vt. 28; *Tenney v. Prince*, 4 Pick. 385; *Bryant v. Eastman*, 7 Cush. 111. One who signs, as a principal promisor, a promissory

THIS was an appeal from the rejection by Mr. Commissioner FANE of a proof tendered against the separate estate of Tilden Smith, one of the above-named bankrupts, upon a promissory note, which was as follows: —

“ £3000.

Nov. 27, 1850.

“ On demand we jointly and severally promise to pay to Edward Yates, Esq., or order, three thousand pounds, with interest at the rate of 5*l.* per cent per annum, for value received.

“ TILDEN SMITH.

“ RICHARD SMITH.

“ HENRY SMITH.

“ Richard Russell,

“ 82, Borough, 29th Sept., 1856.”

The ground of rejection was, that the note had been altered some years after it was given, with the consent of the holder, the present appellant.

*Mr. Selwyn* and *Mr. Aspland*, in support of the appeal. — They contended that the additional name, although placed on the face of the note, was added for the purpose of rendering Mr. Russell liable on the note. It was therefore equivalent to an indorsement and did not invalidate the document.

\*They referred to *Catton v. Simpson*, (a) *Anderson v. Weston*. (b) \* 192

*Mr. Bacon* and *Mr. Bagley*, for the respondents. — The effect of the addition depends entirely on the custom of merchants. If made on the back of the document, it has, as interpreted by that custom, a particular meaning which there is no ground for ascribing to it when placed on the face of the note. Placed where it is, its effect is to add another drawer. But such an addition after the note is issued renders it void.

note which has already been delivered and accepted is not liable thereon without independent proof of a new consideration. *Green v. Shepherd*, 5 Allen, 589; *Tenney v. Prince*, 4 Pick. 385; *Benthall v. Judkins*, 13 Met. 265; *Mecorney v. Stanley*, 18 Cushing. 87; *Stone v. White*, *ubi supra*.

(a) 8 Ad. & Ell. 136.

(b) 6 Bing. N. C. 296.

They referred to *Gardner v. Walsh* (*a*) and *Bowman v. Nicholls*, (*b*) and further contended that time had been given to the principal debtors, and that the surety was consequently discharged.

*Mr. Selwyn* replied.

THE LORD JUSTICE BRUCE.—It is only necessary to notice two points. One is as to the effect (if any) of time having been given to Tilden Smith, or to the makers of the note, or any one or more of them. The objection made on that ground appears to me unfounded, because the question is only whether the estate of Tilden Smith is liable, and if time was given at all, it was given at the request of Tilden Smith through his agent. That objection therefore wholly fails.

The next question is as to the meaning and intention with which Richard Russell signed his name on the note, and it is, in \* 193 my opinion, established by the evidence, that Mr. Russell signed the note in the character of an indorser and for the purpose of indorsement only. It is true that his name is written on the face of the note; but it has been for more than a century settled that this makes no difference where the intention is such as it was here. It is clear, that a signature having the effect of indorsement, and according to a secondary sense of the term called an indorsement, may be written on the face of the note,<sup>1</sup> and, if written with the same intention and effect as if written on the back, will have the same effect. It would be very absurd if it had not. As this appears to me an indorsement, and nothing else, the proof must, in my opinion, be admitted. The petitioner's costs will come out of the estate.

THE LORD JUSTICE TURNER.—I agree, and for the same reasons. I think the intention of the parties was not to add a new maker of the note, but to add a new person to those already liable. This might be done by adding his name without constituting him a new maker of the note or altering it in any way.

(*a*) 5 Ell. & Bl. 83.

(*b*) 5 T. R. 587.

<sup>1</sup> See Story Prom. Notes (6th ed.) §§ 121, 152.

\* *Ex parte* JOHN BOULDERSON BARKWORTH, WIL- \* 194  
LIAM CHAPMAN, and CHRISTOPHER SIMPSON.

In the Matter of ROBERT HARRISON, JAMES KIERO WAT-  
SON, and HENRY PEASE, Bankrupts.

1858. January 29, 30. Before the LORDS JUSTICES.

Undue bills of exchange were from time to time remitted to a banker by a customer, and indorsed to the banker. The course of dealing was, that the bills were not entered short, but, though they were distinguished in the account as bills, the full amounts were entered in the cash column under the dates on which the bills were paid into the bank, and the customer was at all times at liberty to draw checks to the extent of the balance in his favour, as appearing on the account thus made out. Interest was allowed by the banker upon the bills only from the time when their amount was received.

*Held*, that, in the absence of evidence of the customer's acquiescing in or authorizing the banker's treating the bills as his own from the time of their being paid in, they remained the property of the customer subject to the lien of the banker for his cash balance; that the banker had no right to negotiate them unless the balance of the account was in his favour; and that, on the bankruptcy of the banker, such of them as remained in his hands in specie did not pass to his assignees, but, subject to such lien as above-mentioned, belonged to the customer.

The observations of Lord ELDON, in *Ex parte Sergeant*, 1 Rose, 158, explained.

THIS was an appeal by the assignees from an order of Mr. Commissioner AYRTON, declaring that certain bills of exchange belonged to the respondents.

The bankrupts carried on business as bankers at Hull under the firm of Harrison, Watson, & Co. The respondents, Messrs. Froggatt, Woodward, and Marriott, who were timber merchants, opened an ordinary banking account with them on 4th May, 1854, which account was kept open till 24th September, 1857, when the bankrupts stopped payment.

Froggatt & Co. from time to time remitted to the bankrupts, as their bankers, both cash and undue bills of exchange indorsed by them to the bankers or order. These bills were sometimes remitted together with cash, \* sometimes alone, and were \* 195 never entered short in the account between the customers and the bank, either in the books of the bank, or in the customer's pass-book, but were entered separately as bills in an inner column,

the dates on which they fell due being entered. The total amount, whether of bills alone, or of bills and cash together, was then carried forward into the cash column as one sum of cash to the credit of the customers. Thus, if on 10th March cash was paid in, and on 15th March bills accepted by X. & Co. and Y. & Co. for 500*l.* and 400*l.* due 26th April and 5th May were paid in along with a sum of cash, the entries would stand as follows:—

	£ s. d.	£ s. d.
10th March — Cash . . . . .	900 0 0	
15th .. X. & Co. 26th April . . . . .	500 0 0	
Y. & Co., 5th May . . . . .	400 0 0	
Cash . . . . .	100 0 0	
	<hr/>	<hr/>
	1000 0 0	

When a bill was dishonoured, the amount of the bill, with the expenses, was entered on the debit side of the account. On 31st December in each year a balance was struck, and the balance, though composed partly of undue bills and partly of cash, was carried over in one sum as cash. The only difference made between undue bills and cash was, that for the purpose of calculating interest, the bills were not considered as cash till they were paid, the interest account being kept in the way usual with bankers who allow interest. The object of entering in the account the times at which the bills became payable was to facilitate the calculation of the interest on the above footing. The customers were at all times at liberty to draw to the extent of the balance appearing to be in their favour according to this mode of keeping the account. From 1st January, 1857, to 24th September, \* 196 \* 1857, the bankers would have been uniformly under advances if they had not negotiated any of the bills before they became due. They had, however, negotiated them to such an extent, that the moneys actually received by them in respect of the bills and cash considerably exceeded what they had paid out to the customers or their order.

Harrison, Watson, & Co. stopped payment on 24th September, and were on the same day adjudged bankrupts. At the time of the bankruptcy they had in their hands a number of bills, which had been thus indorsed to them by Froggatt & Co., and which had been entered in the above manner, and the state of the account

was such, that supposing these bills taken out of the account, there was still a large balance in favour of the customers.

On 23d December, 1857, Mr. Commissioner AYRTON, on the application of Froggatt & Co., made an order declaring that all the bills of exchange which had been transmitted by Froggatt & Co. to the bankrupts before their bankruptcy, and which remained in the possession of the bankrupts at the time of their bankruptcy, were the property of Froggatt & Co., and ought to be delivered to them by the assignees, and that Froggatt & Co. were entitled to the proceeds of all bills so remitted, of which the assignees had obtained payment since the bankruptcy, but that such declarations were to be without prejudice to any right of set-off or lien which the bankrupts had before their bankruptcy.

The assignees appealed against this order, contending, that the bills belonged to them. They alleged in their petition of appeal, and adduced evidence to prove, that all bills remitted to the bankers by their customers had \* habitually been placed \* 197 in the bankers' bill case indiscriminately, like bank notes, without keeping separate the bills paid in by different customers, and without classifying the bills in any way except by sorting them according to the dates on which they became due, and that such was the custom of the banks at Hull, except the Hull branch of the Bank of England. That it was also the custom of bankers at Hull, except the Hull branch of the Bank of England, to place bills remitted by a customer to his credit as cash under the date on which they were paid in, and thenceforth to treat them as belonging to themselves as if they purchased or discounted them, and to dispose of them for their own purposes without regard to the customer by whom they had been paid in : that bankers were not considered to hold such bills merely as agents for the purpose of collecting the moneys payable in respect of them, and that the bankrupts had always treated and considered the bills as having become their own property, just as if they had discounted them, and had acted on the belief that they were entitled to dispose of them without regard to the state of the customer's account.

Various letters which passed between the customers and the bankers were put in evidence by the assignees, with the view of proving two points ; first, that the customers knew that the bankers were in the habit of dealing with the bills as their own, and recognized their right to do so ; and secondly, that the bankers

were bound by the course of dealing to honour checks to the amount of bills paid in, though not due. It is not thought necessary to set out this correspondence ; it being enough to say, as to the letters written before the stoppage, that the Court did not consider them to establish that the customers knew of or sanctioned the practice of the bank, to negotiate the bills when the

\* 198 account, irrespective of \* undue bills, was not overdrawn.

The last letter written by the customers was written immediately after the bank had stopped payment, and by it the customers desired the bankers not to negotiate or part with any of the bills then in their hands.

*Mr. Selwyn, Mr. Nalder, and Mr. Mellish* (of the Common Law Bar), for the assignees, in support of the appeal. — The commissioner's judgment involves a decision that the bankers were guilty of a crime in dealing with the bills as they did ; we submit, on the contrary, that they were right in considering the bills as their own. The question is, whether, according to the contract, express or implied, between the parties, the bankers were not to be treated as having discounted the bills, and so become owners of them. A customer who opens an account with a banker at Hull must, in the absence of express contract, be held to agree, that the account shall be kept according to, and the rights of the parties be governed by, the custom of bankers at Hull ; and that the custom there is for the banker to treat the bills as his own is clearly proved. The mode of keeping the account was, of itself, notice of this to the customer. There is no tangible difference between the process shown by the mode of keeping this account and the process of discounting. The Courts have disapproved of the custom of a banker's discounting his customers' bills when not under advances, but it is established, and the Courts have sometimes been obliged at last to recognize a custom which they have disapproved. *Stewart v. Aberdeen.* (a) *Humfrey v. Dale* (b) shows the force of a custom of trade. The present case is distinguishable from all the cases which will be relied on by the other side, as *Giles v. Perkins*, (c) and *Thompson v. Giles*. (d)

\* 199 In *Thompson v. Giles*, the balance of account, apart from the undue bills, was uniformly in the customer's favour,

(a) 4 M. & W. 211.

(c) 9 East, 12.

(b) 7 E. & B. 266.

(d) 2 B. & C. 422.

which is not the case here. There was wanting in that case what is proved here, a uniform practice by the bankers of dealing with the bills as their own, irrespective of the state of the account ; and lastly, it is proved here, that the customer knew of such a course of dealing on the part of the bankers. The last letter of the customers, in which they desire the bankers not to negotiate particular bills, shows that they understood the bankers to have a right up to that time to negotiate all bills in their hands. The observations of Lord HARDWICKE in *Ex parte Oursel* (*a*) are in our favour, and we come within the observations of Lord ELDON in *Ex parte Sergeant*, (*b*) and the decision in *Ex parte Thompson*, (*c*) which follows them. The cases of *Ex parte Pease*, (*d*) *Bent v. Puller*, (*e*) and *Ex parte Smith*, (*g*) tend the same way. *Ex parte Twogood* (*h*) shows that indorsement throws the burden of proof upon those who say that the property does not pass at once. The contract between the parties was such, that the bankers could not have returned the bills and claimed immediate payment of the balance, neither therefore could the customer tender payment of the balance and claim back the bills ; this shows that the property in them was changed as soon as they reached the bankers' hands. We are in the case put by BAYLEY, J., in *Thompson v. Giles*. (*i*)

*Mr. Bacon, Mr. Serjt. Hayes, and Mr. Browne*, for Messrs. Froggatt.—A member of this same bank was the petitioner in *Ex \* parte Pease*, (*k*) in which case strong observations were made as to a banker's treating his customers' bills as his own ; now, the members of the firm come here as witnesses, stating that it is the practice of the Hull bankers to do so. If the appellants had proved that the customers knew of and assented to the bankers dealing with the bills as their own, the case would stand on quite a different footing, but there is no evidence of such knowledge. What the appellants must show is, that it was understood between the parties that there was not to be any restriction on the dealing with the bills by the bankers. The only matters relied on as evidencing this are the pass-book

- (*a*) Amb. 297.
- (*b*) 1 Rose, 153.
- (*c*) 1 Mont. & Mac. 102.
- (*d*) 1 Rose, 292 ; 19 Ves. 25.
- (*e*) 5 T. R. 494.

- (*g*) Buck. 355.
- (*h*) 19 Ves. 227.
- (*i*) 2 B. & C. 428.
- (*k*) 10 Ves. 25.

and the correspondence. The mode of keeping the account in the pass-book is quite consistent with what is the natural contract in such a case, viz., that the bills should remain the property of the customers, subject to a right, which we do not dispute that the bankers had, of negotiating them if the state of the account was such that otherwise they would be under cash advances. The correspondence carries the matter no further ; it shows that the customers knew that the bankers negotiated some of the bills, but the state of the account was for a long time such as to justify that, and there is nothing to show knowledge that the bankers negotiated them to a greater extent than the state of the account required. In this absence of evidence in support of knowledge and assent the case is governed by *Thompson v. Giles*; (a) evidence was given there as to the custom of bankers, such as the appellants rely on here. The observations of Lord ELDON, in *Ex parte Sergeant*, (b) are referred to as against us, and as irreconcilable with *Thompson v. Giles*; but Justice BAYLEY in

\* 201 the latter case treats the decision as consistent \* with what

Lord ELDON had said. Lord ELDON was the last Judge to make observations in one case inconsistent with what he decided in other cases, and his remark in *Ex parte Sergeant* has been misunderstood. Interpreting his language fairly it means no more than this,—that if the bills are by the course of dealing between the parties to be taken as cash, in such sense that the customer may at any time bring an action for the balance of his account, then the bills from the time of being paid in belong to the bankers ; this being, in fact, an arrangement that the bankers are to be deemed discounters of the bills. *Ex parte Thompson* (c) is not warranted by *Ex parte Sergeant*, and is overruled in *Ex parte Benson*. (d)

*Ex parte Armitstead* (e) and *Jombart v. Woollett* (g) were also referred to.

*Mr. Nalder*, in reply.

THE LORD JUSTICE KNIGHT BRUCE.—This appeal has been ably argued, but the case appears to be merely thus : A banker becomes

(a) 2 B. & C. 422.

(b) 1 Rose, 153.

(c) 1 Mont & Mac. 102.

(d) 1 Mont. & Bl. 120.

(e) 2 Glyn & J. 371.

(g) 2 M. & C. 389.

bankrupt, having in his possession short bills transmitted to him by a customer. The customer says to the assignees, "I will pay you the cash balance (if any) in your favour, and relieve your estate from all liabilities on my account. Return me my bills." "No," say the assignees, "the bills are ours, we will keep them; you can come in as a creditor;" a claim on their part almost as startling as one of a similar kind relating to the plate or title-deeds of a customer would be. The claim is rested on the alleged ground that, by agreement or course of dealing, the bills, from the time when they reached the hands \* of the bankers, were theirs: a proposition not impossible, though in a high degree improbable,— a proposition which it lies on those who assert it to establish by clear evidence. The question is, whether this difficulty has been surmounted by the assignees; whether they have shown that so improbable an agreement was in fact entered into. Of some of the circumstances on which they rely, *Thompson v. Giles* completely disposes,— a decision since which more than thirty years have elapsed,— a decision which I do not understand to have been substantially questioned,— a decision by which the course of business in England has long been governed, and which has the recommendation of being in conformity with good sense and honesty. It is said that Lord ELDON judicially expressed himself in a manner at variance with it. To this I do not accede. He has used language which, taken apart from the context and from the orders made by him, may give colour for such a contention, but which, taken in connection with the context and with a recollection of the orders made by him on such subjects, appears to me consistent with the whole of the doctrine laid down in *Thompson v. Giles* by the learned Judges who decided that case. It is said that the circumstances here are materially different from those of that case, as to the state of the account, the bankers' mode of treating the bills, and the customers' knowledge of what they did. The account, in my opinion, contains nothing in support of the claim of the appellants. The bankers' mode of treating the bills of their customers was in the course of their own business, with which the customers had nothing to do. As to knowledge on the part of the customer, none is shown of any thing which involved more than that the bankers had a lien on the bills for their balance, and a right to deal with them from time to time so

\* 203 far as the exigencies of that right might require. The correspondence proves no more. The question comes \* merely to this: Did the customer agree that in all circumstances, and for all purposes, the short bills should from the time of their being paid in become the property of the bankers? It was with propriety and ability suggested by *Mr. Nalder* that the case of the assignees is established by this, that the bankers could not at any time retire from the arrangement and say to the customer, "Take back your bills and pay us our balance." Could that proposition be maintained, his argument would, I think, be of great weight, but I conceive that it cannot be. It appears to me consistent with all the evidence, to say that the bankers could at any time have closed the account, refused to have any further dealings with the customer, tendered him his bills, and required payment of their balance. In my opinion the order of the commissioner is right, and the appeal without foundation.

THE LORD JUSTICE TURNER.—Whatever weight might have been due to the arguments on the part of the appellants if they had been brought forward before the decision in *Thomson v. Giles*, that case appears to me to dispose of the whole of them. Three points have been relied upon by the appellants as distinguishing this case from *Thomson v. Giles*. First, that the state of the account between the bankers and the customers was not the same in this case as in that. Secondly, that in this case it had been the uniform practice of the bankers to deal with the bills as their own, and that such was the custom of bankers at Hull; and thirdly, that in this case the customers knew of the course of dealing by the bankers with the bills, but that no such knowledge was proved in *Thomson v. Giles*. Now, as to the first point, the state of the account, however it may vary the facts of the case, cannot

\* 204 \* affect the principle on which *Thomson v. Giles* was decided. Then as to the mode in which the bankers dealt with the bills, there was in *Thomson v. Giles* the same course of dealing as in the present case, and I do not see how any mode of dealing by the bankers can affect the customer, unless knowledge of it is brought home to him. On looking at the evidence before us it does not seem to me that there is any proof of the customers having known that the bankers discounted the bills when the

balance of the account was in the customer's favour, and it is admitted that the bankers had the right so to discount when they were under advances. It is said, however, that the correspondence proves a contract between the bankers and the customers that the bills when paid in should be the property of the bankers. Now, the bills may have been paid in on either of these two contracts,—that they should be the property of the bankers; or that they should remain the property of the customers, but subject to a lien on the part of the bankers for their cash advances. It was urged by the appellants that the correspondence shows the former to have been the contract, because the customers in writing to the bankers ascertain the balance in their own favour by reckoning the unpaid bills as cash. But this was the correct mode of estimating the balance on either view. Whether the contract was that the bills should be the property of the bankers, or should be subject to their lien, the balance on which the customer could draw would be thus ascertained. The assignees relied on a letter written by the customers after the stoppage of payment, requiring the bankers not to deal with the bills, but this does not show that there was a contract in force up to that time authorizing the bankers to deal with the bills as they pleased, for a new state of circumstances had arisen which made it reasonable to give such a notice as a measure of precaution.

\* *Mr. Nalder* ably pressed upon us an argument founded \* 205 on the assumption that the bankers could not have closed the account at their pleasure; that they could not have returned the bills and claimed immediate payment of the balance; but whether they could have done so or not does not seem to me to affect the case. If they could not have done so it must have been because there was a contract that they should honour checks to the amount of the bills paid in; and if there was such a contract the case would still be the same. I think the case is wholly governed by *Thomson v. Giles*.

It was said that Lord ELDON, in *Ex parte Sargeant*, (a) expressed an opinion inconsistent with the decision in *Thomson v. Giles*. But *Ex parte Sargeant* was cited in the argument of *Thomson v. Giles*, and the learned Judges who decided that case

do not appear to have considered their decision inconsistent with Lord ELDON's observations in *Ex parte Sargeant*; nor on looking at *Ex parte Sargeant* do I see any ground for imputing the inconsistency suggested. What Lord ELDON said was, "That the bills were not written short amounts to nothing, unless there be a concurrence, manifested at the time or to be inferred from the habits of dealing between the parties, that they were to be considered as cash. If they were there with the petitioner's knowledge as cash, and he drawing or entitled to draw on them as having that credit in cash, he would thereby be precluded from recurring to them specifically." What did Lord ELDON mean by "considered as cash?" Not that the bills were entered in the account as cash; that he expressly excludes; but, as I take it, he meant that they were paid in on the footing on which cash is paid in, so that on their being paid in the bankers would immediately

\* 206 become \* in every sense absolute debtors for the amount.

Looking at Lord ELDON's remarks in this light they do not seem to me to be at all inconsistent with the decision in *Thomson v. Giles*. I am of opinion, therefore, that this appeal is without foundation and must be dismissed. Messrs. Froggatt will take their costs out of the estate.

*Ex parte JOHN DALES.*

In the Matter of JOHN DALES.

1858. January 23. Before the LORDS JUSTICES.

Where after admitting a debt under a trader debtor summons, the debtor obtained protection under the arrangement clauses of the Bankrupt Law Consolidation Act, and the creditor petitioned for adjudication in bankruptcy, but did not proceed to obtain adjudication, and adjudication was obtained on the petition by another creditor: *Held*, that the adjudication was valid.

THIS was an appeal from a decision of Mr. Commissioner FON-BLANQUE, adjudicating the appellant a bankrupt.

On the 14th of October, 1857, the appellant was served with a  
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trader debtor summons under the 78th section of the Bankrupt Law Consolidation Act.

On the 23d of October the appellant appeared upon the summons and admitted the debt.

On the same day he filed a petition for protection under the arrangement clauses, and the usual order for protection was made until further order.

On the 4th of November, the creditor who had obtained the summons filed a petition for adjudication, but did not proceed on the petition.

Another creditor, however, under the 96th section of the Act proceeded upon the petition, and upon his application was made the adjudication which was the subject of the appeal.

\* *Mr. Selwyn* and *Mr. Bagley*, in support of the appeal. — \* 207  
They contended that the case was materially distinguishable from *Ex parte Walker*, (a) in the circumstance of the creditor who had obtained the trader debtor summons not having proceeded upon it to adjudication of bankruptcy. It might well be, that a debtor could not by petitioning for protection intercept the remedy of a creditor who had previously commenced proceedings towards bankruptcy, and yet that where the debtor had sought protection it should be available against all creditors who had not previously taken such proceedings. Unless the protection clauses were valid against any subsequent proceedings towards bankruptcy, their principal object would be defeated, which was to place it in the power of a debtor, by a timely application of his own, to obtain time for making such an arrangement as might satisfy the requisite majority of his creditors, and prevent the minority from forcing him into bankruptcy.

*Mr. Swanston* and *Mr. C. Swanston*, for the creditor who had obtained the adjudication, were stopped by the Court.

Their Lordships held, that the case was not materially distinguishable from *Ex parte Walker*, (a) and dismissed the appeal.

\* 208 \* *Ex parte* THEOPHILUS CARRICK, JOHN BOUDERSON BARKWORTH, WILLIAM CHAPMAN, and CHRISTOPHER SIMPSON.

In the Matter of ROBERT HARRISON, JAMES KIERO WATSON, and HENRY PEASE, Bankrupts.

1858. January 30. February 1, 12. Before the LORDS JUSTICES.

B. was in the habit of drawing bills on H. & Co., bankers, and of remitting bills to them to an amount fully sufficient to meet their acceptances. H. & Co. became bankrupt. At that time there were in the hands of holders for value undue bills to a large amount drawn by B. upon H. & Co. and accepted by them, but H. & Co. had misappropriated the greater part of the bills remitted to meet them: *Held*, that B. could not claim to have returned to him such of the remitted bills as remained in the hands of H. & Co. at the time of their bankruptcy, but that they must be applied so far as they would extend in payment of the bills accepted by H. & Co.<sup>1</sup>

THIS case came before the Court on appeal by the assignees from an order of Mr. Commissioner AYRTON, but the only question argued in it arose between the different respondents.

Mr. Burstall, a timber merchant in Canada, having large dealings with English merchants, opened an account with the bankrupts, who carried on business as bankers in Hull under the firm of Harrison, Watson, & Co. He was in the habit of drawing bills of exchange upon them, and of remitting to them bills accepted by his different customers to whom cargoes had been consigned. The bankers stopped payment on the morning of 24th September, 1857, the bank not being opened on that day, and they were adjudged bankrupts on the same day. At the time of stoppage there were in the hands of the Union Bank of London and several other banking firms undue bills drawn by Burstall upon, and accepted, by Harrison, Watson, & Co., to the amount of upwards of 120,000*l.*; and there were in the hands of Harrison, Watson, & Co. bills remitted to them by Burstall to the amount of above 40,000*l.* The question now arising was, who were entitled to these latter bills.

<sup>1</sup> See 2 Lindley Partn. (Eng. ed. 1860) 929.

The state of the account between the bankers and \*Burstall on the evening of 23d September, is shown by \* 209 the following statement, which, during the course of the argument on the appeal was made out for the use of the Court and agreed to by all parties: —

	£ s. d.
“ At this date the bank was under a cash advance on account of Mr. Burstall (by having paid his drafts on them beyond the amount of remittances which had become cash by being paid at maturity) to the amount of . . . . .	22,571 8 0
But they had, as hereinafter mentioned, discounted or used his bills to a much larger extent.	
The bank had also accepted bills drawn on them by Burstall, but which were then not due, to the aggregate amount of . . . . .	126,616 18 4
 Total liability . . . . .	 <u>149,138 6 4</u>

These acceptances, to the extent of 126,616*l.*, are the bills in the hands of the different banks, the petitioners in the Court of Bankruptcy.

Burstall had remitted to Harrison, Watson, & Co. sundry bills on his customers, none of which had become due by 23d September, to the aggregate amount of . . . . . 150,787 19 10

Thus covering the liabilities and leaving a surplus of 1599*l.* 13*s.* 6*d.*

The bank, by the 23d September, had discounted or used for their own purposes of these bills . 107,379 15 2

Leaving in their hands at the time of stoppage bills to the extent of . . . . . 48,408 4 8 which are the subject of the present litigation.

\* The whole of the bankers' acceptances, to the extent of \* 210 126,616*l.* 18*s.* 4*d.*, have since been dishonoured.”

In these circumstances the commissioner, on 23d December, 1857, on the petition of the Union Bank and the other holders of

bills drawn by Burstall on Harrison, Watson, & Co., made an order declaring that the assignees ought to take an account of all bills drawn by Burstall upon, and accepted by, the bankrupts, and circulated by Burstall, and that the assignees ought to apply the proceeds of the bills of exchange remitted by Burstall to the bank and come to their hands, in payment of the amounts secured by the bills of exchange drawn by Burstall upon and accepted by the bankrupts, and held by the petitioners, their proofs being reduced by the amounts so applied.

The assignees appealed against this order, and the appeal stood in the paper of the Lords Justices immediately below the appeal from the order made on Messrs. Froggatt's petition. (a) Upon judgment being given in that case, *Mr. Selwyn*, for the assignees, stated that he did not consider it right to take up the time of the Court with the present appeal, which, after the decision in the former case, was hopeless. It was, however, arranged that, in order to save the expense of a separate appeal by Burstall, it should be argued whether the holders of the bills drawn by him on Harrison, Watson, & Co. were entitled, as against him, to the bills remitted by him to the bank and remaining *in specie* at the stoppage. Burstall had been reduced to insolvency by the failure of the bank, and his affairs were being wound up under inspectorship, it being stated at the bar that there was not in Canada any law corresponding to the English law of bankruptcy.

\* 211 \* *Mr. Lloyd*, for Burstall. — At the time of the bankruptcy the balance in Burstall's favour was 1599*l.* 13*s.* 6*d.*; therefore, as between him and the bankers, he had paid the bills for 126,616*l.*, they having been provided by him with funds sufficient for that purpose, and which they were bound to apply for that purpose. The cargo bills were an indemnity fund to them, but were also an indemnity fund to Burstall. The bankers have misapplied that fund to an enormous extent, and they cannot have any right to indemnify themselves by means of the residue of it till they have made good what they have misapplied. The case is similar to that of a trustee who has a beneficial interest in the fund and has committed a breach of trust. He cannot claim any inter-

(a) *Supra*, 194.

est in the fund till he has made good the loss. Again, if the present order stands, Burstall, who as between himself and the bankers has paid the whole of the bills now in the hands of the bill-holders, will be called upon to pay a dividend on those bills, thus in part paying the bills twice over owing to the default of the bankers ; and yet the order gives the bankers a right to indemnity out of the residue of the cargo bills. I contend that the equity of the bankers against the remaining cargo bills is neutralized by their breach of trust to a larger amount, and that the bill-holders can only claim against me through the equity of the bankers, which being removed, the right of the bill-holders falls with it. This takes the case out of *Ex parte Waring* (a) and *Powles v. Hargraves*, (b) which latter case well explains the principle of the former, the difficulty being to see how the bill-holders could enforce a contract between strangers. It is admitted on all hands that the bill-holders have not any direct equity. If, then, \* the bankers would as against Burstall have had no claim \* 212 against these cargo bills if there had been no bankruptcy, the bill-holders cannot have any.

*Mr. Bacon* and *Mr. Karslake*, for the bill-holders. — There is no distinction between the present case and that of *Ex parte Waring*. Lord ELDON there went upon the ground that the remitted bills must be treated as specifically pledged to meet the acceptances.

[THE LORD JUSTICE KNIGHT BRUCE. — Do you claim a better right against the cargo bills than the bankers could have claimed if there had been no bankruptcy ?]

No ; not a better right, but a different right. The bankruptcy renders a certain course of administration necessary, and to carry out this administration the cargo bills must be applied according to the trust upon which they were held.

[THE LORD JUSTICE TURNER. — The bill-holders were no parties to the engagement between the banker and customer as to the cargo bills.]

(a) 19 Ves. 344; 2 Rose, 182.

(b) 3 De G., M. & G. 430.

That objection, we submit, is disposed of by *Ex parte Waring*.

[THE LORD JUSTICE TURNER.—But was it not disposed of by means of the equity of the bankers ?

THE LORD JUSTICE KNIGHT BRUCE.—Is not the question substantially this: what were the rights between the bankers and Mr. Burstall at the moment of the bankruptcy,—what must Mr. Burstall have done before he could claim to have the cargo bills returned to him ? ]

The bankers could not be called upon to hand over any of the cargo bills, except on being indemnified against their acceptances.

[THE LORD JUSTICE TURNER.—Then comes the question, what is the effect of their having misapplied 80,000*l.* which ought to have been employed in meeting those acceptances ? ]

There was no breach of duty in their application of the cargo bills, which was made in the ordinary course of business, and only creates a debt from them.

\* 213 [THE LORD JUSTICE TURNER.—May there \* not be this distinction between *Ex parte Waring* and the present case, that there the same principle applied to the whole fund; here a part of the fund has been diverted from its proper purpose ? ]

That, we submit, is no reason for diverting more of it from its proper purpose. All the cargo bills were applicable to pay the banker's acceptances, and on the day before the bankruptcy Burstall could not have claimed back the remaining bills without indemnifying the bankers to an equal amount against their acceptances. So far as they had discounted the cargo bills they were indemnified, but Burstall must have indemnified them further before he could have got back the bills which had not been discounted. If the figures in *Ex parte Waring* are looked at, the case decides the present contention; there, as here, the cash balance was against the bankers, but the order, taking no notice of that, gives the whole of the short bills to the holders of the acceptances.

*Mr. Lloyd*, in reply. — Supposing these bills handed over to the bill-holders, then, according to Burstall's original contract with the bankers, he ought to be relieved from all liability in respect of their acceptances, having put the bankers in funds to meet them ; but he will not be so relieved, the bill-holders will come against his estate for the 126,616*l.*, after deducting from it the 43,408*l.* If, before the bankruptcy, the parties had come to a settlement, the matter could not have been wound up without the bankers indemnifying Burstall against acceptances to the extent of what they had misapplied of his cargo bills, and this right, I submit, must be worked out by means of that part of the cargo bills which remained *in specie*. The bankruptcy does not alter the right.

[THE LORD JUSTICE TURNER. — Can you claim any thing more as to the 43,408*l.* than to have it applied according to its original \* destination ? As to any thing more, are not your \* 214 rights simply those of a general creditor ? If the bankrupts had discounted all your cargo bills you would have been nothing but a general creditor : are you any thing more for the part which they have discounted ?]

Suppose a bill had been filed and the 43,408*l.* brought into Court, and the bankers had been sued by a bill-holder, and had then applied for indemnity out of the fund in Court, would not the answer have been, “ You have received funds to the extent of 107,879*l.* to pay bills with ; till you have paid bills to that amount you have not any claim on this fund.”

[THE LORD JUSTICE TURNER. — But the fund in Court must go to somebody. Must it not be applied to pay the bills ? Do you contend that in the case you are supposing you could take it out of Court ? ]

I should contend that, subject to the indemnity of the bankers, the fund belonged to me, and that, if they did not discharge their obligations to me in respect of the transactions their right to indemnity would be gone, and that I could take the fund out of

Court. Paying the 43,408*l.* to the bill-holders tends to relieve the estate of Harrison, Watson, & Co. from proof to which it ought to be subjected. Suppose the bill-holders came against Burstall and he paid them, then he would be entitled to prove against the bankers for the whole, and they would not have any right to resort to the 43,408*l.* till they had paid dividends equal in amount to what they had misappropriated.

THE LORD JUSTICE TURNER.—This is a petition by the assignees, complaining of the decision of the commissioner, by which he ordered them to deliver up certain short bills called cargo bills.

The nature of the case is this: Mr. Burstall, in Canada, was

\* 215 in the habit of drawing bills upon the bankrupts \* Harrison,

Watson, & Co., bankers, at Hull, and of remitting to them cargo bills for the purpose of indemnifying them against their liability upon the bills drawn by him upon them. It appears that at the time of the bankruptcy there were cargo bills to the amount of 43,408*l.* 4*s.* 8*d.* remaining in the hands of Harrison, Watson, & Co., but they had discounted other similar bills to the amount of 107,879*l.* 15*s.* 2*d.*, which had also been remitted by Burstall for the purpose of being employed in payment of the bills which he had drawn upon them. This discounting was for the most part unauthorized and improper, having been carried to a far greater extent than was warranted by the state of the account between the bankers and Mr. Burstall.

No question now arises with the assignees. We have already decided that they cannot hold these bills as part of the general estate of the bankrupts. But the question arises between Mr. Burstall and the holders of the bills for 126,616*l.* 18*s.* 4*d.*, drawn by him upon, and accepted by, Harrison, Watson, & Co., with respect to the application of the cargo bills for 43,408*l.* 4*s.* 8*d.*, which, as we have decided, form no part of the general estate of the bankrupts. The bill-holders contend that this 43,408*l.* 4*s.* 8*d.* of cargo bills ought to be applied in payment of the bills held by them, and the commissioner has so ordered; Mr. Burstall, on the other hand, contends, that some other application should be made of them.

Now, it is obvious, that the application of this 43,408*l.* 4*s.* 8*d.* in payment of the bill-holders will be a relief to Mr. Burstall to

that extent, and it is not less obvious that he has a right to have that sum applied in payment of those bills, the cargo bills having been placed by him in the hands of Harrison, Watson, & Co., in \*order that they might be so applied. It is contended, \* 216 however, on the part of Mr. Burstall, that he has some further right, and he says that he has a right to stop this 43,408*l.* 4*s.* 8*d.* until the bankrupts have made good so much of the 107,879*l.* 15*s.* 2*d.* of bills as they have improperly discounted.

Now, in the first place, these cargo bills were placed in the hands of the bankrupts for the purpose of paying the bills accepted by them for Mr. Burstall, and therefore the application of them towards the payment of the 126,616*l.* 18*s.* 4*d.*, is according to the original trust on which they were placed in the bankrupt's hands. To apply them otherwise would be in truth to vary, in some degree, the original trust on which the bills were sent to the bankrupts, and to create a new equity and a new right in favour of Mr. Burstall, different from the purpose for which the bills were originally placed in their hands. How is this new right to arise? It can only arise upon the bankruptcy of Harrison, Watson, & Co. But that bankruptcy entirely put an end to the trust. The relation which had subsisted between Harrison, Watson, & Co. and Mr. Burstall was determined and brought to a point by the bankruptcy, and at that point the rights and liabilities of the parties were to be ascertained, and the debt and credit must be fixed at the period of the bankruptcy. It is now proposed to keep alive the indemnity for the purpose of which the bills were originally placed in the hands of Harrison, Watson, & Co., to keep it alive upon new rights arising on the bankruptcy. I think that this cannot be done. It seems to me that the application of the cargo bills towards the payment of the bill-holders is all that can be required on the part of Mr. Burstall, and that the rest must be matter of proof between the estates, as to which I say nothing whatever. It may be an important and a difficult \*question \* 217 what proofs are to be made between these two estates, and I think that the question before us ultimately will resolve itself into a question of proof between the estates, and not into the right contended for on the part of Mr. Burstall.

My opinion, therefore, is, that this 43,408*l.* 4*s.* 8*d.* must be applied to the payment of the bill-holders, of course reducing the

proof against the estate of Harrison, Watson, & Co. to that extent, which I understand to have been originally provided for.

THE LORD JUSTICE KNIGHT BRUCE.—I am of the same opinion.

Some discussion then took place as to the assignees' costs of this petition of appeal, and of the previous one relating to Messrs. Froggatt's bills. Their Lordships were at first inclined to leave the appellants' costs to be disposed of by the commissioner, but after some further remarks from counsel, in the course of which it was stated that the assignees had appealed in both cases in compliance with the request of a large body of creditors, and against their own individual interests,

THE LORD JUSTICE TURNER.—It seems to me that these petitions were almost absolutely necessary for the administration of the estate, and that it was very reasonable that they should be brought before the Court, having regard to the great difficulties in the question, and the possible distinction that there might be between this case and that of *Ex parte* Waring. Therefore I think we may as well at once order the costs of both petitions to be paid out of the estate.

\* 218     \* THE LORD JUSTICE KNIGHT BRUCE.—Let it be so. It appears that the appellants were set in motion by a very considerable body of creditors.

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*Ex parte* GEORGE HENRY SELLERS.

In the Matter of GEORGE HENRY SELLERS, a Bankrupt.

1858. February 12. Before the LORDS JUSTICES.

Certificate refused to a bankrupt on the ground that the proceedings in bankruptcy were taken collusively for his benefit, and that there were no assets whatever for distribution.

THIS was an appeal by the bankrupt from an order of Mr. Commissioner GOULBURN, refusing to grant him a certificate or protection.

The bankrupt carried on business as a merchant and commission agent at Liverpool and New York, in partnership with Hugh Spooner Sands, under the firm of Sellers & Sands, from May, 1852, to June, 1854. In the latter month the firm suspended payment, being indebted to unsecured creditors to the amount of 9916*l.* 1*s.* 4*d.*, the assets consisting of doubtful debts, to the amount of 6567*l.* 1*s.* 10*d.* Since this time the bankrupt had not been engaged in trade, but had latterly been in the employ of his brother F. W. Sellers.

On 9th October, 1856, the bankrupt signed a declaration of insolvency, attested by his attorney Henry Norris, who filed it in Court on 11th October, 1856.

On 22d October, 1856, a petition for adjudication was filed by James Norris, the brother of Henry Norris, who also attested it. The petitioning creditor's debt was a debt of 50*l.* 2*s.* 6*d.* due from the firm of Sellers & Sands, and incurred in 1854. Under this petition Sellers was adjudged bankrupt, and his brother F. W. Sellers proved a debt of such amount as to enable him \*to carry the choice of creditor's assignees. He appointed \*219 the petitioning creditor James Norris sole assignee.

At the sitting for the last examination the learned commissioner considered the bankrupt's accounts to be insufficient, the bankrupt having no books of his own personal estate to refer to, but only extracts from the books of the firm, which were kept at New York. He accordingly adjourned the last examination *sine die*. On 3d August, 1857, the Lords Justices made an order, declaring that the bankrupt ought to be allowed to pass his last examination, such order to be without prejudice to any question as to the granting or refusing his certificate.

On 23d December, 1857, a sitting was held for considering the bankrupt's application for a certificate. No vouchers as to the items of the bankrupt's expenditure were forthcoming, and there were no assets whatever. The commissioner made an order, stating that he came to the conclusions : (1) that the bankruptcy was concerted for the benefit of the bankrupt in evasion of the 17 & 18 Vict. c. 119, § 20, and without any view of distributing assets among his creditors ; (2) that the bankrupt had acted fraudulently

by contracting debts without any prospect of paying them ; and (3) that the account rendered by the bankrupt, not being duly vouched, was not such as the bankrupt law required. On these grounds the commissioner refused the certificate, granting protection for one month, to enable the bankrupt to appeal if he should think fit.

The bankrupt accordingly appealed, and by his affidavit in support of the appeal stated that in 1855 and 1856 James Norris repeatedly pressed him for payment of his debt ; that he \* 220 answered that he had no funds, and \* that there were no assets in England ; that Norris then asked to see the partnership books, and the bankrupt repeatedly wrote to New York for them, but Sands would not send them ; that Norris thereupon declared he would try if he could not, by making the deponent a bankrupt, force Sands to send them ; and that the proceedings in bankruptcy were not concerted, but were taken adversely with the above object by Norris, who had repeatedly stated to the bankrupt that he had suspicions in consequence of the books not being forthcoming, and that though his debt was small he was determined to avail himself of his legal remedies.

*Mr. Bacon*, for the bankrupt, in support of the appeal. — I submit that to hold the existence of assets necessary to the grant of a certificate would be a dangerous doctrine, and would offer a premium to buying goods on credit in order that there might be something to distribute. There is nothing to contradict the bankrupt's direct evidence that the bankruptcy was not concerted for his benefit, and the Court will not act on mere suspicion. As to the amount of the trade debts, the insolvency of the firm was chiefly owing to the failure of one of their principal debtors. It could not be expected that the bankrupt should be able to furnish vouchers as to the items of his personal expenditure, which was very moderate, and the books of the firm have been produced and inspected.

*Mr. Roxburgh*, for the creditor's assignee, said that the object of the proceedings in bankruptcy was, as stated by the bankrupt, to obtain inspection of the partnership books. This had been obtained. The assignee was satisfied by the inspection that the bankrupt had truly represented that there were no assets, and he had no opposition to offer to the granting the certificate.

\* *Mr. Bagley*, for the official assignee, said that he \* 221 should leave the case in the hands of the Court without argument. In answer to a question from their Lordships, he stated that the accounts were not properly vouched, and that the accounts of the bankrupt's expenditure were not vouched at all.

*Mr. Bacon*, in reply.

THE LORD JUSTICE KNIGHT BRUCE.—The materials before the Court satisfy me that this bankruptcy is the bankrupt's own proceeding, as much so, for every substantial purpose, as if it had been so literally and in form. The fact, then, that there neither is, nor has been, any the least amount of property for administration under the bankruptcy, appears to me material; and I am of opinion that on these two grounds, taken together, the certificate must continue refused. But if the bankrupt can, as he probably can, procure the assent of all the creditors who have proved to the annulling of the bankruptcy, and shall himself wish that course to be taken, I shall not dissent from an order for annulling it.<sup>1</sup>

THE LORD JUSTICE TURNER.—As my learned brother agrees with the commissioner, my opinion is immaterial; but I am not clear that upon the materials before us collusion as to the adjudication ought to be imputed to the bankrupt, and I therefore feel some doubt whether the case is one in which a certificate ought to be wholly refused. I am of opinion, however, that at all events the circumstances are such that it ought to be suspended for a considerable length of time.

1858. February 13, 16. Before the LORDS JUSTICES.

The 125th section of the Bankrupt Law Consolidation Act (12 & 13 Vict. c. 106), relating to goods in the order and disposition of a bankrupt "at the time he becomes bankrupt," extends to goods which are in his order and disposition

<sup>1</sup> See *Ex parte Jones*, L. R. 3 Ch. Ap. 144.

at the time of his committing any act of bankruptcy capable of supporting the adjudication, though such act be prior to the act on which the adjudication is founded.

*Per the Lord Justice TURNER.* The Act for the Registration of Bills of Sale (17 & 18 Vict. c. 36) does not narrow the application of the doctrine of reputed ownership.

THIS was an appeal by the defendant from a decree of Vice-Chancellor STUART declaring certain bills of sale made to the defendant by James Glover void as against the plaintiffs, who were Glover's assignees in bankruptcy.

In April, 1856, Glover carried on business as a victualler at the Blue Posts Tavern, of which he had a lease, and he was possessed of fixtures, furniture, and effects in the tavern.

On 19th April, 1856, Glover executed to the defendant Cubitt a bill of sale of certain effects mentioned in the schedule thereto (being effects in the tavern) as a security for 364*l.* 10*s.* This bill of sale was never registered under 17 & 18 Vict. c. 36. (a)

\* 223 Another precisely \* similar bill of sale of the same goods to Cubitt for the same debt was executed on 15th May, 1856, and the process was repeated on the 6th of June, the 24th of June and the 16th of July. None of these bills of sale were registered. Ultimately, on 5th August, 1856, another bill of sale was given to the same effect as the former ones, except that, the

(a) The Act 17 & 18 Vict. c. 36, directs, that a bill of sale shall be registered in manner therein mentioned, "otherwise such bill of sale shall, as against all assignees of the estate and effects of the person whose goods or any of them are comprised in such bill of sale under the laws relating to bankruptcy or insolvency, or under any assignment for the benefit of the creditors of such person, and as against all sheriff's officers and other persons seizing any property or effects comprised in such bill of sale in the execution of any process of any Court of Law or Equity authorizing the seizure of the goods of the person by whom or of whose goods such bill of sale shall have been made, and against every person on whose behalf such process shall have been issued, be null and void to all intents and purposes whatsoever, so far as regards the property in or right to the possession of any personal chattels comprised in such bill of sale, which at or after the time of such bankruptcy, or of filing the insolvent's petition in such insolvency, or of the execution by the debtor of such assignment for the benefit of his creditors, or of executing such process (as the case may be), and after the expiration of the said period of twenty-one days, shall be in the possession or apparent possession of the person making such bill of sale, or of any person against whom the process shall have issued under or in the execution of which such bill of sale shall have been made or given, as the case may be."

debt having been reduced in the interval, it was given to secure only 239*l.* 8*s.* 6*d.* This bill of sale was registered on 25th August, 1856. These transactions were managed by Mr. Watson a solicitor, who was the person really advancing 200*l.* out of the 364*l.* 10*s.* The evidence was conflicting as to the precise nature of his interest, it being positively sworn to, on one side, that Cubitt took the bill of sale as trustee for Watson to the extent of 200*l.*, and, on the other side, that Watson had no interest in the bill of sale, but advanced the money at the request of Cubitt, and solely on Cubitt's personal responsibility, treating it as money lent to him and advanced on his behalf to Glover. Throughout the whole of the above period Glover was in embarrassed circumstances, and, in the opinion of the Court, the evidence established that Cubitt must have known him to be so. It was stated by the defendant that the object of having this series of bills of sale was to avoid registration as long as possible, in order that Glover's credit might not suffer.

In July, 1856, before the execution of the last bill of \* sale, Glover committed an act of bankruptcy by keeping \* 224 house to avoid his creditors. It did not appear that Cubitt was aware of this.

On 11th August, 1856, Glover, with the concurrence and by the agency of Cubitt, agreed to underlet the tavern to James Greenland, with the fixtures, furniture, and effects therein, at a weekly rent of 12*l.* from that day until 24th March, 1860, and Greenland thereupon took possession. Up to this time the chattels were all in Glover's possession. A lease to Greenland was executed on the 20th of August in pursuance of this agreement.

On the 23d of August, 1856, Glover committed another act of bankruptcy by executing an assignment to Watson, for the benefit of his creditors, and on the 19th of December, 1856, he was adjudged bankrupt on the petition of a creditor whose debt was prior to July, the bankruptcy being founded on the execution of the creditors' deed.

In the course of the bankruptcy proceedings Watson disclaimed all interest in the bill of sale, declaring that he never had any.

In February, 1857, the defendant sent a man into the Blue Posts Tavern to take possession on his behalf of the fixtures, furniture, and effects, comprised in the bills of sale. The assignees in bankruptcy thereupon filed the present bill to have the bills of sale set

aside as being fraudulent against them, and Vice-Chancellor STUART made a decree to that effect. The defendant appealed.

*Mr. W. D. Lewis* for the plaintiffs, in support of the decree.

— The whole transaction was a scheme to elude the 17 \* 225 \* & 18 Vict. c. 36, and therefore invalid. All the bills of sale but the last are bad for want of registration, and the last was executed after an act of bankruptcy capable of supporting the adjudication. The defendant denies notice of the act of bankruptcy, but that is of no use unless he can protect himself under the 133d section of the Act, which he cannot, for though we do not prove notice of an act of bankruptcy, there was no *bond fide* dealing with the property. We are, moreover, entitled to the goods as having been within the reputed ownership of the bankrupt at the time of his becoming bankrupt, for those words are satisfied by the commission of any act of bankruptcy capable of supporting the adjudication. The defendant was, as to the greater part of the money, a trustee for Watson. Watson has disclaimed, and that disclaimer must enure to the benefit of the assignees.

*Mr. Elmsley* and *Mr. T. Terrell* for the defendant. — There was no design to evade the Registration Act. After each bill of sale had been granted, the grantee consented to allow it to remain unregistered ; but there was never any prior agreement that it should not be registered. The Act allows twenty-one days, and the defendant took them. There is no fraud on the Act in that. The prior bills of sale are, at the worst, useless ; we rely on the last. It is said that the transaction is against the policy of the Registration Act, but an Act of this kind cannot be construed loosely, so as to include cases not coming within its terms : *Alexander v. Brame*, (a) under the 9 Geo. 2, c. 36, is an instance of this.

As to reputed ownership, we contend that chattels assigned by a registered bill of sale are not liable to that doctrine. This \* 226 is plain on the scope of the Act, which \* says, that if the bill of sale is not registered, it shall be void as against the assignees in bankruptcy ; this is unmeaning and unnecessary unless a registered bill of sale takes goods out of the doctrine of reputed ownership. The intention that it should do so is reason-

(a) 3 W. R. 642, L. Js. [S. C. 7 De G. M. & G. 525.]

able; the registration of a bill of sale gives it a notoriety which excludes apparent ownership in the grantor.

[THE LORD JUSTICE TURNER.—I do not think that the intention of the legislature, in passing the 17 & 18 Vict. c. 36, was to alter the law as to reputed ownership. The Act does not say, that registration shall give any new effect to a bill of sale; and in the enactment as to the effect of omitting to register it, various persons, with some of whom the doctrine of reputed ownership has nothing to do, are classed together. On your construction, how do goods stand as to reputed ownership between the execution of the bill of sale and its registration ?]

Then we submit that, even if the registration of the bill of sale did not take the goods out of the reputed ownership of the bankrupt, they were not within it at the time when he became bankrupt. On 11th August, 1856, they were placed in the possession of Greenland, who held them on behalf of the defendant. The act of bankruptcy on which the adjudication was founded did not take place till the 23d of September, and that is the earliest period to which the words "becomes bankrupt" in 12 & 13 Vict. c. 106, § 125, can be referred. No doubt the Court can, for the purpose of supporting a fiat, go back to an earlier act of bankruptcy capable of supporting it; but there is no authority for saying that the Court will thus go back for the purpose of defeating the title of third persons. In *Fawcett v. Fearne* (a) the relation is stated to be to "the act of bankruptcy." But even \*if \* 227 the doctrine of reputed ownership be applicable, we are saved by section 138 of the Bankrupt Law Consolidation Act, which protects *bond fide* dealings with a bankrupt without notice of an act of bankruptcy.

[THE LORD JUSTICE KNIGHT BRUCE here referred to *Devas v. Venables*, (b) and THE LORD JUSTICE TURNER to the second resolution in *Twyne's Case*, (c) on the question whether the transaction was entered into "really and *bond fide*."]

Then it is said that this was a fraudulent preference, but it was not so, for it was made under pressure. *Van Casteel v. Booker.* (a)

*Mr. Lewis*, in reply.

February 16.

THE LORD JUSTICE KNIGHT BRUCE.—It is plain that in the month of July, 1856, Glover, the bankrupt, committed one or more act or acts of bankruptcy capable of supporting the adjudication of bankruptcy which took place in the following December, the petitioning creditor's debt having been due from a time preceding July, 1856. It seems clear also that upon the pleadings and evidence we must consider that throughout that month of July, and during at least the first nine or ten days of August, 1856, the goods in question were in Glover's order and disposition and reputed ownership, especially as no interest in the house where the goods (some of them perhaps tenant's fixtures) were, or in the lease of it held by the bankrupt, was conferred, or professed to be conferred, by any one of the bills of sale mentioned in the pleadings; nor can it be denied that if the defendant has any title at all it is merely under the bill of sale of 5th August, 1856,

registered upon and not before the 25th of that month. It  
\* 228 \* is manifest also that in the month of April, 1856, and

from that time continually to the adjudication of bankruptcy, Glover was in pecuniary difficulties and embarrassed circumstances, and known by the defendant to be so. In such a state of things it is impossible not to consider as material the series and succession of unregistered bills of sale, commencing in April, 1856, which preceded the bill of sale of August, registered in that month. It was signed and sealed on the 5th; on the 11th the possession of Greenland, the new tenant, commenced; on the 20th the lease to him was executed; on the 23d was the assignment on which, as an act of bankruptcy, the adjudication was pronounced, and on the 25th was the registration, as I have said; nor was there any other valuable consideration for the August bill of sale than there had been for the former or any one or more of the former bills of sale. Considering the connection of Mr. Watson with the whole business, and adopting the observations of Lord Chief Justice TINDAL in *Devas v. Venables*, (b) so far as they are

(a) 2 Exch. 691.

(b) 3 Bing. N. C. 400.

applicable, and I do not think them wholly inapplicable, to the case now before us, I am of opinion that neither the bill of sale of August, nor its registration, was a contract dealing or transaction by or with the bankrupt which was really and *bond fide* made or entered into within the meaning of the 133d section of the Bankrupt Law Consolidation Act. The decree seems to me right.

THE LORD JUSTICE TURNER. — I entirely agree, and have nothing to add, except that I adhere to the opinion which I expressed during the argument, that the Statute 17 & 18 Vict. c. 36, does not in any degree narrow the application of the doctrine of reputed ownership.

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\* *Ex parte* ROBERT HARRISON, JAMES KIERS \* 229  
WATSON and HENRY PEARSE.

In the Matter of ROBERT HARRISON, JAMES KIERS WATSON and HENRY PEARSE.

1858. March 11. Before the Lord Chancellor Lord CHELMSFORD and the LORDS JUSTICES.

Where, by an accident, a petition of appeal in bankruptcy did not reach the registrar's office in office hours on the last day for entering it, but was on that day tendered to one of the clerks in the office at his residence, who declined to receive it, doubting his authority to do so, the Court ordered the petition to be received as of that day, without prejudice to any objection.

THIS was an *ex parte* application that an appeal in bankruptcy might be entered, although twenty-one days from the date of the decision appealed from had expired.

By an accident the petition, which had been signed on the 10th of March, the twenty-first day after the decision, had been taken into a wrong room in the office of the London agents, and was not discovered until after four o'clock, when the bankruptcy office closes.

A messenger was forthwith sent to the residence of one of the clerks in the registrar's office. He saw the clerk on the evening of the 10th, and requested him to receive the petition, but the clerk declined to receive it, doubting his authority to do so.

*Mr. Hardy*, in support of the application, submitted that the appeal had been substantially entered in time.

Their Lordships ordered the petition to be received as of the 10th of March, without prejudice to any objection.

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*Ex parte* CHARLES BALDWIN.

In the Matter of EDWARD BALDWIN, a Bankrupt.

1858. March 15, 18, 23. Before the LORDS JUSTICES.

B. was the sole registered proprietor of certain newspapers published by him on premises of which he was the rated occupier, and he was the owner of the type and plant used in the publication. He mortgaged the newspapers, type, and plant to F., who took no steps to alter the registration of proprietorship. The sheriff entered under an execution issued by a creditor of B., and, though possession was demanded by F., remained in possession till B. had become bankrupt, which took place after two days.

*Held*, that the right of publishing a newspaper is goods and chattels within the meaning of the enactment of the Bankrupt Law Consolidation Act as to reputed ownership.<sup>1</sup>

*Held*, that the type and plant were not within the order and disposition of the bankrupt, at the time of his bankruptcy, with the consent of the true owner, but that the right of publication of the newspapers was not capable of seizure by the sheriff, and that as the bankrupt continued the sole registered proprietor, and nothing had been done to make it apparent that he was not the sole owner, the doctrine of reputed ownership applied to the newspapers.

THESE were appeals by mortgagees of certain personal property of the bankrupt from orders of Mr. Commissioner EVANS dismissing their petitions for enforcing their securities.

In and before February, 1858, Edward Baldwin, the bankrupt, was the proprietor of certain newspapers called the Morning Herald, the Standard, and the St. James's Chronicle, and was the owner of certain plant, steam-engines, machinery, presses, types, and other chattels used in and about the printing and publishing

<sup>1</sup> See Kelly v. Hutton, L. R. 3 Ch. Ap. 703.

of the newspapers, which chattels were then upon premises in Shoe Lane, where the papers were published.

On 1st February, 1853, the bankrupt, in consideration of 7000*l.* advanced to him by the appellant Foss, assigned to Foss the above-mentioned newspapers and the entire copyrights thereof, and also all such and so much and such part and parts of the plant, steam-engines, machinery, \* printing-presses, types, and \* 231 other chattels and effects used in the conduct and publication of the newspapers as were of a personal nature, as well those then upon the Shoe Lane premises as those which might afterwards be brought there, and also all profits to be derived from the said newspapers and the other property thereby assigned, subject to a proviso for redemption, if the bankrupt, his heirs, &c. should on 28th January, 1858, or on such earlier day as Foss, his executors, administrators, or assigns, should appoint by a notice in writing, to be delivered or left as therein mentioned six months before the day named in such notice, pay to Foss, his executors, administrators, or assigns, the 7000*l.* with interest at 6*l.* per cent. The deed contained a power of sale on default in payment, a proviso for quiet enjoyment by the mortgagor till default, a covenant by the mortgagor for payment of interest quarterly, and a stipulation that if interest was punctually paid, the principal should not be called in till 28th January, 1858.

On 20th February, 1853, the bankrupt mortgaged the "Standard" and "St. James's Chronicle," with the plant, &c. employed in their printing and publication, to Charles Baldwin, subject to the mortgage to Foss.

Interest was not duly paid, and on 7th May, 1856, Foss gave notice in writing to the mortgagor to pay off the mortgage on 10th November then next.

At this time the mortgagor was in difficulties, and on 6th June a meeting was held of his principal creditors. This meeting was attended by five creditors, whose debts amounted to about 70,000*l.*, Foss and C. Baldwin being two of them. The state of the mortgagor's affairs was discussed, and the above mortgages were made known to the creditors then present. On the 10th of June another \* meeting was held, which was not attended by any \* 232 other creditor. At this meeting the mortgagor was required to sign a declaration of insolvency, and place it in the hands of one of the creditors to be used as occasion might require, which

the mortgagor accordingly did. Certain resolutions were passed for the continuance of the publication of the papers by the mortgagor under the control of the principal creditors, and he remained the ostensible proprietor and manager, the mortgagees agreeing, at the request of the other creditors then present, to suspend the enforcing their securities. It did not appear that any notice of the mortgages was given to any creditors but those who attended the above meetings, nor that the meetings were advertised, so as to be known to the creditors generally. The mortgagor continued to carry on the publication of the papers under the inspection of the above five creditors, but without any formal deed of inspectorship being executed.

On 16th February, 1857, an execution was levied upon the effects of the mortgagor at Shoe Lane, under a judgment obtained by one Henry Jenkins. On 17th February Charles Baldwin served notice of his security, and required the sheriffs to withdraw, which they declined to do. On the 18th Edward Baldwin filed a declaration of insolvency, and was on the same day adjudged bankrupt. The sheriffs in consequence on the following day gave up possession.

By arrangement the mortgaged property was sold by the assignees without prejudice to any question as to the rights of the mortgagees. The purchase-money amounted to 16,500*l.* The mortgagees then respectively presented their petitions to establish their lien as mortgagees. The learned Commissioner held that the mortgages were altogether invalid as against the assignees, on the \* 233 ground \* of reputed ownership. The mortgagees severally appealed against this decision.

The *Solicitor-General* (Sir H. CAIRNS) and *Mr. Hanen* for Foss, in support of his appeal, and *Mr. T. Stevens* for C. Baldwin.—The first question is, whether the property in the newspapers, apart from the plant, &c. is of such a kind as would pass to the assignees under the doctrine of reputed ownership, and we submit that it is not. It is urged on behalf of the assignees, that *Longman v. Tripp* (a) decides this point against us; but that was a case of copyright. Now the interest in the newspapers here is not copyright; it is more in the nature of the right to a trademark. A Court of Common Law gives damages against a stranger

(a) 2 Bos. & P. (N. S.) 67.

for using the mark, because he commits a fraud in doing so, and a Court of Equity will restrain such user by injunction. The right which the person rightfully using the mark thus acquires cannot be considered as included in the words "goods and chattels." The observations of Lord DENMAN, in *Sims v. Thomas*, (a) as to those words, are material.

So far the doctrine of reputed ownership is capable of application, we contend that it is excluded on two grounds: First, the notoriety of the change of ownership, notice having been given of the mortgages at the meeting of creditors. *Gurr v. Rutton*, (b) *Edwards v. Scott*. (c) Secondly, the seizure by the sheriff, which took the goods out of the possession of the bankrupt before the act of bankruptcy, is sufficient to exclude the doctrine, as is shown by the observation of Lord \*WENSLEYDALE in \*234 *Fletcher v. Manning*. (d) *Barrow v. Bell* (e) appears contrary, but was decided without argument; *Fletcher v. Manning* was not cited, and moreover the bankrupt there had retained the apparent possession, nor had any attempt been made by the mortgagee to take possession, till after the bankruptcy. Here, on 17th February, a demand of possession was made, so from that time there was no consent of the true owner. A demand of possession, though not complied with, excludes reputed ownership. *Smith v. Topping*. (g) A suggestion was made by the judges in *Barrow v. Bell*, (e) that the sheriff was a trespasser, and that his tortious act could not alter the rights of other parties. That, we submit, is not a just argument. The Court is construing a penal clause which pays one man's debts with another man's property, and it cannot be applied to a case which does not come within its terms; so if the goods are not in the order and disposition of the bankrupt it cannot apply. The sheriff had the goods to the exclusion of the bankrupt, and whether he had them by right or wrong, still he had them, and the bankrupt could not deal with them.

[Their Lordships asked how the sheriff could seize the copyright.]

We submit that it is not properly copyright, but a mere *chose*

- (a) 12 Ad. & Ell. 596, 554.  
(b) Holt, N. P. 327.  
(c) 1 M. & G. 962.

- (d) 12 M. & W. 571, 581.  
(e) 5 Ell. & B. 540.  
(g) 5 B. & Ad. 674.

*in action*, and it is clear that the sheriff can seize a *chose in action*. Moreover he seized types, paper, machinery, all the things without which the paper could not be printed, so that the right to print it must be deemed to have been seized. If the so-called copyright was capable of being seized, it was seized, the sheriff having taken every thing he could ; if it is incapable of being seized, it is not goods or chattels, and reputed ownership does not apply. No argument against us can justly be founded on the fact of

\* 235 \* no entry having been made at the stamp-office to show the change of ownership, when the mortgages were executed. The objects of the Act 6 & 7 Will. 4, c. 76, were two, to ascertain a person against whom an action for libel might be brought, and that some person might always be known from whom the duty might be claimed. The Act does not contemplate the registration of a mortgage ; it requires the entry of the names of "proprietors," which word must, we submit, be understood in its ordinary sense, and not as including a mortgage. The Act, moreover, does not require the entry of the names of all the proprietors of a paper, so that the entry of a name is not even *prima facie* evidence of exclusive ownership, and the register is not open to inspection, except for the purpose of civil or criminal proceedings ; so an entry there has no publicity, and therefore cannot be required for the purpose of excluding reputed ownership.

*Mr. Bacon* and *Mr. Roxburgh*, for the assignees. — The property in the newspapers is undoubtedly capable of passing to the assignees under the doctrine of reputed ownership. The words "goods and chattels" include *chooses in action*, as has been repeatedly decided, and must include property like this. As to the alleged notoriety of change of ownership, it did not exist. How could notoriety be produced by mentioning a fact to a private meeting of five large creditors, who in no way represented the rest, the meeting not even having been advertised ? The registration of a single person as proprietor of a newspaper is conclusive as to the ownership. *Harmer v. Westmacott* ; (a) notice ought therefore to have been given at the office, and such has been the opinion of the profession ; 5 Jarm. Byth. (b) The appellants say,

\* 236 that the right of publication is a *chose in action* ; \* notice

(a) 6 Sim. 284.

(b) Page 269, 3d ed.

is confessedly requisite to take a *chase in action* out of the reputed ownership. The bankrupt might have sold to a purchaser for value without notice; there was nothing to prevent such purchaser from being registered, and he would thereupon have got a good title. Foss therefore, did not do all he could to make his title complete. Apart, therefore, from the seizure by the sheriff, the appellants have no case. Now as to the seizure, if wrongful, it could not alter the rights of other parties; but, if rightful, we say that it was not such as to exclude reputed ownership. Every thing to all appearance went on as before, the mere secret presence of the sheriff's officer could not be of any avail. As to the right of publication, there was no seizure at all.

[THE LORD JUSTICE TURNER.—May it not be plausibly contended, that the seizure of every thing connected with the publication of the paper operated as a seizure of the right of publication?]

We submit, that the sheriff cannot seize any thing, but what has in some way a corporeal existence; the right of the proprietor here was really nothing but a license from government to print a paper with a certain name and under certain conditions. *Smith v. Toppling* (*a*) does not prove that a demand of possession by the bargainer under a bill of sale is alone enough in a case like this, for in that case the goods had never been the goods of the bankrupt.

*Mr. Hannen*, in reply on Foss's appeal.—The Act 6 & 7 Will. 4, c. 76, does not establish a registry of mortgages, nor does it require a statement of the names of all the proprietors. A person inspecting the register has not, therefore, any right to presume that the person whose name he finds there is the sole owner. *Harmer v. Westmacott* (*b*) was a case of fraud, and so not applicable.

\* *Mr. T. Stevens*, in reply on C. Baldwin's appeal.— \* 287 Under the Act 6 & 7 Will. 4, c. 76, the paper could not have been published in any other place than on these premises of which the sheriff took possession; there was, therefore, in effect a seizure of the right of publication. Notice by the mortgagees was

given to him as to all the property, so that there was no consent of the true owner as to the right of publication any more than as to the corporeal chattels.

Judgment reserved.

March 23.

THE LORD JUSTICE KNIGHT BRUCE.—As to the tangible property in question upon these petitions, included in the respective securities of the petitioners, which was seized by the sheriff before the bankruptcy, and in his possession down to the bankruptcy, I am of opinion, that at the time of the bankruptcy it was not in the order, disposition, and reputed ownership of the bankrupt with the consent of both or either of the petitioners. The notice served on the bailiff before the bankruptcy, on behalf in effect of the two petitioners, although mentioning the security of the petitioner, Mr. Baldwin only, was, I conceive, available for both the petitioners, according to their respective titles, and so for Mr. Foss as the prior mortgagee. Thus far, therefore, I differ from the learned commissioner.

With regard however to the property not tangible, that which has been called the copyright of the newspapers, and was a right to publish newspapers bearing particular names, I agree with him. This property, this right, was not nor could have been seized by the sheriff, and neither of the petitioners' mortgages was in my

opinion rendered, by means of the communication made to  
\* 238 the \* meetings of some of the bankrupt's creditors or otherwise,

sufficiently public or notorious, to preclude the reputed ownership of the bankrupt with regard to it. He was registered at the stamp-office as the sole proprietor of the newspapers, was the rated occupier and master of the house where the printing and publishing of them were carried on, and was generally known and recognized as their proprietor. Observations were well made by *Mr. Stevens* on the circumstances that the types and other visible effects used in printing and bringing out the newspapers were in the possession of the sheriff before and at the time of the bankruptcy, and that the newspapers could not be printed elsewhere than where they were then printed, without a fresh entry at the stamp-office. These facts, however, I do not on consideration think make any difference.

The order before us consequently (if my learned brother agrees, as I believe him to do, with me) will be altered as to the tangible effects, but not further, and the deposit will be divided.

As to the tangible effects, there will be a mortgagees' order.

**THE LORD JUSTICE TURNER.** — These are petitions by mortgagees of three newspapers, and of the type and plant and machinery attached to the establishment, complaining of a decision of Mr. Commissioner EVANS, by which he held, that the property in the newspapers and the type and plant and machinery, were in the order and disposition of the bankrupt at the time of his bankruptcy, and therefore passed to the assignees. The bankrupt was the sole proprietor of the newspapers, and he alone had made the statutory declaration \* required by the newspaper Acts; and \* 239 matters continued in that position down to the time of the bankruptcy. No such statutory declaration as was required by the Acts was ever made by either of the mortgagees.

The case, in the argument before us, was very properly divided into two questions: first, the question as to the right in the newspapers, and, secondly, as to the right in the plant.

As to the newspapers, it was contended that they were not goods and chattels within the meaning of the 125th section of the Bankrupt Act, which provides for goods and chattels of which the bankrupt is reputed owner passing to the assignees. It was said that the right in a newspaper was a mere right to publish the paper under a particular name, and that such a right could not be considered as goods and chattels within the meaning of the Act.<sup>1</sup> But, to say nothing of the copyright in the newspaper, which undoubtedly exists, the right of publishing a newspaper is a right to which an interest is attached. It is a right protected by Courts of Law and Courts of Equity, and therefore a proprietary right, and the statutes, the very newspaper Acts on which the argument before us proceeded, treat the matter as a matter of property, and the right as being a proprietary right. I feel no doubt, therefore, that the property in these newspapers must be considered as goods and chattels within the meaning of the Bankrupt Act. These words "goods and chattels" are words of very extensive significance, and undoubtedly comprise both tangible property and prop-

<sup>1</sup> See *Kelly v. Hutton*, L. R. 3 Ch. Ap. 708.

erty that is not tangible. If there had been any doubt in my mind upon this point it would have been removed by the \* 240 case of *Longman v. Tripp*, \* which seems to me to be a decisive authority upon this subject, and to be well founded in point of law.

This part of the case was further argued as to the copyrights upon this ground: It was said that the newspaper Acts were Acts that were merely passed for fiscal purposes, that they had nothing to do with the rights in property, and therefore could not be considered as at all affecting the question of whether this property was in the nature of goods and chattels within the meaning of the Bankrupt Act. But the decision in *Longman v. Tripp* seems to me to cover that point also, and, independently of the case of *Longman v. Tripp*, I think the argument derived from the newspaper statutes is not at all well founded; for whether these statutes are for fiscal purposes or not, they at all events furnish the means by which the ownership of the property may be made known to the world: the declarations which are made under the newspaper Acts are *indicia* of property, and where such *indicia* exist, I apprehend they must be attended to. The declarations evidence the ownership of the property in the proprietors, and what may be effectual to remove that evidence must be resorted to. The case of *Sims v. Thomas* was referred to on this subject in support of the appellant's argument, but that case does not seem to me to affect the question at all. That was a case under the Insolvent Debtors' Act of 1 Geo. 4, c. 119, which has nothing to do with the question of reputed ownership, there being no clause of reputed ownership contained in the statute; but what is more material is this, that the observations there made upon the words "goods and chattels" have reference, not to any such words as used in that statute, but to the words as used in the statute of Elizabeth for the protection of creditors. It has been long well settled that the policy of the statute of Elizabeth being to \* 241 prevent impediments \* to judgments in favour of creditors, the words "goods and chattels" in that statute apply to goods and chattels which may be made the subject of an execution. When we consider the use of the words "goods and chattels" in the statute of Elizabeth, and also their use in the Bankrupt Act, the use of the words in the two statutes is plainly different. In the case of the statute of Elizabeth the purpose is

to secure to creditors their executions against the goods and chattels of their debtors, and the words therefore apply to property which may be the subject of an execution, but in the case of the Bankrupt Act, the provision is for the purpose of preventing creditors being deceived by an apparent ownership in the property, a mischief which applies not only to tangible property, but to property which is not tangible, and of course therefore the words "goods and chattels" in that Act have been construed to apply as well to property which is not tangible as to property which is tangible.

I fully agree, therefore, with the decision of the learned commissioner upon the question of the property in the newspapers, but with respect to the plant I very respectfully dissent from his opinion. The learned commissioner's judgment on this point seems to have been founded almost entirely upon the case of *Barrow v. Bell*, (a) but upon examining that case I do not think that it at all governs the present. The true ground of the decision in *Barrow v. Bell* is, I think, to be found in the judgment of Mr. Justice ERLE. The question there was as to goods in a trader's house which were not the property of the trader. There being an execution against the goods, the sheriff had taken all the goods in the house, and it was held that the fact of the sheriff having taken the \* goods which did not belong to the trader, \* 242 did not take them out of the trader's order and disposition, but that they passed to the assignees. Upon looking, however, to the facts of the case, it will be found to be stated that after the execution levied, "Eyre" (who was the debtor) "remained in possession of the said furniture from the date of the indenture of assignment by way of mortgage down to the seizure of the same by the plaintiff as after mentioned" (that is the seizure by the mortgagee), "unless his possession was determined by the seizure of the furniture by the sheriff as hereinbefore mentioned." So that there was no alteration whatever in the possession of the property, except by the sheriff's seizure; and what Mr. Justice ERLE says on the subject is this: "I also am of opinion that the goods were in the possession, order, and disposition of Eyre at the bankruptcy, and up to the time of filing the petition. It is clear that had the sheriff never acted, that would be so. Did the sher-

(a) 5 E. &amp; B. 540.

iff's entry upon the premises, and his claim to take the goods as Eyre's, make any difference as regards the true owner and the assignees of Eyre? I think not. There is a fallacy wrapped up in the use of the ambiguous word 'possession.' When the sheriff claimed to enter into possession of all the goods in the house, that, in so far as he was acting rightfully, was a taking possession in law of all Eyre's goods there, but so far as he was a wrongdoer, that is as to the goods there not belonging to Eyre, he took no possession in law beyond what he took in fact, and the case states that he took no possession in fact at all of the plaintiff's goods." So, in truth, the Court proceeds upon this ground, that there was no taking of the goods in law, because, as they were the goods of the mortgagee, they could not be taken in execution for the debt of Eyre, and the sheriff's act was therefore wrongful, and that

there was no taking of them in fact, because they remained

\* 243 in the possession of Eyre, the sheriff's possession \* of them, so far as he had it, being wrongful. The case of *Barrow v. Bell* does not indeed seem to me to be at all different in substance from some of the preceding cases. I refer particularly to *Jackson v. Irvin*. (a) In that case, there being an execution against a trader, the warrant was given to the shopman of the trader, and the possession of the goods continued the same. The trade was carried on, the shopman holding the warrant of the sheriff under which the goods had been seized. Lord ELLENBOROUGH refers there to the case of a warrant being directed to a gentleman's servant, but he says if the warrant had been not to the servant, but to a bound bailiff, the case would have been all right, so that if the warrant had been to a bound bailiff, his opinion would have been that the execution would have taken the goods out of the order and disposition of the bankrupt.

Now, how does this case stand? The sheriff takes possession of the plant. One of the mortgagees gives him notice to withdraw. There is no pretence for saying that the possession afterwards was in any sense the possession of the bankrupt, or that the bankrupt continued in possession, after the execution by the sheriff, in the same mode as he had been in possession prior to the execution levied. This state of circumstances, I think, brings the case distinctly within the doctrine of *Fletcher v. Manning*, (b) which is in

conformity with a long train of previous decisions to be found in *Jones v. Dwyer*, (a) and *Arbouin v. Williams*, (b) and in *Ex parte Smith* (c) and *Robinson v. M'Donnell*. (d)

The case seems to me, therefore, to be clearly in \* favour \* 244 of the mortgagees as to the plant, but to fail as to the property in the newspapers. An attempt was made to distinguish the case upon the ground of some notoriety of the possession of the mortgagees. I have looked into the evidence on that point, and I am satisfied it cannot be maintained, that the mortgagees are entitled on the ground of any notoriety of their ownership. I fully agree with my learned brother, that the order in this case should stand so far as respects the property in the newspapers, but must be altered so far as respects the property in the plant and chattels.

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\* *Ex parte* CLARKE.

\* 245

*In re* The WELSH POTOSI LEAD AND COPPER MINING COMPANY.

1858. February 19. Before the LORDS JUSTICES.

An order for a call was made on 10th September, 1857, in the course of winding up a joint-stock company in bankruptcy under the Joint-stock Companies' Act, 1856. On 20th November, 1857, an order peremptory was made on C., a contributory, for payment of the amount payable by him in respect of the call. On 27th November he obtained from the commissioner an order suspending the last-mentioned order. On 3d February, 1858, the commissioner rescinded the order of 27th November. C. then appealed against the orders of 10th September, 20th November, and 3d February: *Held*, that as the Act of 1856 gave no right of appeal except by reference to the Bankrupt Law Consolidation Act, and no appeal had been brought against either of the orders of 10th September and 20th November within the time limited by the 12th section of the latter Act, those orders could not be questioned.

*Held*, further, that as the orders of 10th September and 20th November could not be appealed from, it must, in determining whether the suspending order should be continued or not, be assumed that those orders were originally right.

(a) 15 East, 21.

(b) Ry. & Moo. 72.

(c) Buck. 149.

(d) 2 B. & Ald. 184.

THIS was a petition by Thomas Clarke, presented on 10th February, 1858, against three orders of Mr. Commissioner FANE, dated respectively 10th September, 1857, 20th November, 1857, and 3d February, 1858.

The petitioner was the holder of 340 shares in the Welsh Potosi Lead and Copper Mining Company, which, after carrying on operations for several years, was, on 26th June, 1857, registered as a company with limited liability under the Joint-stock Companies Act, 1856, and the petitioner was included in the list of shareholders as a holder of 340 shares. On 8th July, 1857, G. Button, a shareholder, applied to the Court of Bankruptcy for an order to wind up the company, which was made accordingly by Mr. Commissioner FANE on 25th July. On 9th August Clarke's name was included in the list of contributories.

On 10th September, 1857, an order was made on the contributories for a call of 1*l.* per share, payable on or before 5th \* 246 October. A copy of this order was sent to \* Clarke on 12th September by post, and he did not dispute having received it. The order was also inserted in the Gazette on the 18th. He did not make the payment, and on 20th November, 1857, the commissioner made a peremptory order upon him to pay to the official liquidator 310*l.* (the amount of his calls after giving him credit for a sum paid) within seven days after service of the order. This order was served on Clarke on 24th November. On 27th November he moved, before Mr. Commissioner HOLROYD (who was sitting for Mr. Commissioner FANE), for a stay of the peremptory order, on the ground that an action at law in which he (Clarke) sought to recover back the sums paid up by him on his shares was pending, and that an appeal by another contributory was pending which involved questions bearing on his liability to the call. The commissioner acceded to the application and stayed the order peremptory. On 3d February, 1858, Mr. Commissioner FANE rescinded the order of 27th November, 1857.

Clarke appealed against the three orders of 10th September, 1857, 20th November, 1857, and 3d February, 1858.

On the appeal being opened, *Mr. Selwyn*, with whom was *Mr. Roxburgh*, for the official liquidator, took a preliminary objection that the appeal was too late. By the 99th section of the Joint-stock Companies Act, 1856, the general practice in bankruptcy applied to proceedings under this Act, no rules having yet been

made. There was nothing else in the Act to give a right of appeal, and appeals, therefore, were governed by sect. 12 of the Bankrupt Law Consolidation Act, which required them to be brought within twenty-one days.

*Mr. Bacon* and *Mr. T. Terrell* supported the appeal.

\* *Ex parte Sanderson*, (a) and *Ex parte Carter*, (b) were \* 247 referred to.

THE LORD JUSTICE KNIGHT BRUCE.—This petition, presented in the present month under the Joint-stock Companies Act, 1856, is a petition by way of appeal against three orders, dated respectively 10th September, 1857, 20th November, 1857, and 3d February, 1858. The petitioner, as to time is in this difficulty, either he has no right or power of appeal at all, or his right or power is limited by the Bankrupt Law Consolidation Act of 1849. The more beneficial way of viewing the case for him is to hold that he has a limited right of appeal under the Bankrupt Law Consolidation Act, a remark subject to this,—that under that Act he is plainly out of time as to the orders of 10th September, and 20th November, though not so as to the order of 3d February. What did the order of 3d February do? After reciting the peremptory order of 20th November for payment of the call, and Mr. Commissioner Holroyd's order of suspension of 27th November, it discharges the latter order. The question is, whether that order of 3d February was right or wrong. I am of opinion that it was clearly right. The order of 10th September directed that certain contributories, of whom Mr. Clarke was one, should pay a call of 1*l.* per share. This was an order, not in due time questioned, and not now questionable, ordering payment by a certain day. A copy of the order was sent to Mr. Clarke on the 12th of September, and the order was published in the London Gazette on the 18th of that month; it must therefore be assumed, and Mr. Clarke does not dispute, that \* this order was known to him before the \* 248 end of the month. Then by the order of 20th November, which was quite of course, it was ordered that Mr. Clarke should

(a) 5 W. R. 56, L. J.

(b) 1 De G., M. & G. 212; 4 H. L. Cas. 837.

within seven days after personal service of the order pay to the liquidator the sum of 310*l.* This was merely an order fixing another time for payment of the sum which was payable by Mr. Clarke under the former order. Assuming, as in the existing circumstances we must assume, these orders to be right, I cannot see any ground for the suspending order, and, with all deference to the learned commissioner who made it, I think that it should not remain.

THE LORD JUSTICE TURNER.—I am of the same opinion. I should have been glad to try the question on the merits, for the point raised is one of importance, but I do not see how the objection as to time can be got over. We are acting under a statutory jurisdiction, and if the statute does not give any right of appeal we cannot give it. If the statute gives any right of appeal it does so only by the general words of the 99th section, and the right must be subject to the provisions of the Bankrupt Law Consolidation Act. Now, by the 12th section of that Act, an order, if not appealed against within twenty-one days, is to be treated as final. Here no appeal against the order of 10th September, 1857, was brought within the period allowed by that section ; the order therefore became absolute. The suspension order either was inoperative or operated merely by way of suspending a former order. When an application was made to take off the suspension, what was to be looked to ? Not the merits of the order suspended, but whether the circumstances made it right to continue the suspension, assuming the order suspended to have been properly \* 249 made. To hold otherwise \* would be to allow orders which have become absolute to be rescinded by means of suspending orders. The appeal must be dismissed.

*Mr. Selwyn* asked for costs, but the Court, observing that the appeal, though mistaken, was not frivolous, dismissed it without costs, giving the official liquidator his costs out of the estate.

## VANSITTART v. VANSITTART.

1858. March 10, 11. Before the Lord Chancellor Lord CHELMSFORD and the LORDS JUSTICES.

By a memorandum of agreement made between a husband and his wife, who was suing him for a divorce, it was agreed that a deed of separation should be executed, containing, among other provisions therein mentioned, provisions that two of their children should be placed entirely in the custody of the wife, that none of the children should be sent to any school in Berkshire, or at a less sum than 60*l.* a year for each child, and that neither of the two eldest sons should be sent to any school without the written consent of both husband and wife, unless to certain specified places of education.

Held, that the provisions as to the children were contrary to public policy, as interfering with the due discharge of the father's duties with respect to them;<sup>1</sup> and that on this ground, apart from all other objections, a decree for the execution of the deed of separation could not be made, though, if it had been executed, the insertion of those provisions would not have made it wholly void.<sup>2</sup>

THIS was an appeal by the plaintiff from an order of Vice-Chancellor Wood, allowing a demurrer to her bill, which was filed against her husband for the purpose of enforcing an agreement entered into between them for the execution of a deed of separation.

The material statements in the bill were to the following effect:—That in May, 1845, the plaintiff and defendant intermarried, and an antenuptial settlement was made. That there were four children of the marriage,—Sidney Nicholas, aged ten years; Clement Arthur, aged seven years; Alice Rosalie, aged nine years,

<sup>1</sup> See *Hope v. Hope*, 4 De G., M. & G. 347, note (1) and cases cited; 2 Kent (11th ed.), 194 and notes; *Schouler Dom. Rel.* 342, 343; *Torrington v. Norwich*, 21 Conn. 543; *People v. Mercien*, 3 Hill, 408. As to the extent to which a father can assign and transfer his parental rights and duties, in the American States, see *State v. Libbey*, 44 N. H. 321; *State v. Barrett*, 45 N. H. 15; *State v. Smith*, 6 Greenl. 402; *Wodell v. Coggeshall*, 2 Met. 89; *Mayne v. Baldwin*, 1 Halst. Ch. 454; *Poole v. Gott*, 14 Law Rep. 269; 2 Kent (11th ed.), 193, 194, and notes.

<sup>2</sup> See 2 Kent (11th ed.), 175, 176, and notes, 177, n. (a); *Rogers v. Rogers*, 4 Paige, 516; *Champlin v. Champlin*, 1 Hoff. Ch. 55; *Albee v. Wyman*, 10 Gray, 222; *Collins v. Collins*, 1 Phill. N. C. Eq. 153; *Swift v. Swift*, 34 Beav. 266; *Fry Spec. Perf.* (2d Am. ed.) 506–508; *Gibbs v. Harding*, L. R. 8 Eq. 490.

and Cyril Bexley, five years. That in January, 1857, the plaintiff commenced a suit in the Ecclesiastical Court for a separation, on the ground of adultery and cruelty, but that \* negotiations for an arrangement by means of a separation deed having been commenced, no libel had been brought in, the suit having from time to time stood over. That on 11th March, 1857, the following memorandum was drawn up and signed by the plaintiff and the defendant:—

*"Re Vansittart and Vansittart.—Instructions for deed of separation and covenants.—Trustee.—A. B., of the Middle Temple, esquire, barrister at law, trustee on behalf of Mrs. Vansittart. The deed to contain all usual and necessary covenants, clauses, and agreements, to protect Mrs. Vansittart from molestation, &c., to receive her present separate income under the marriage settlement or otherwise, stated at 180*l.* per annum. Mr. Vansittart to allow her the further annual sum of 120*l.*, payable half-yearly, to make up her present income to 300*l.* per annum, to be payable out of the income receivable by Mr. Vansittart under the marriage settlement. Mr. Vansittart upon due payment of separate income (*sic*) secured by trustee's covenant from debts of Mrs. Vansittart. The children.—Mrs. Vansittart to have the custody of two of the children, viz. the daughter (after she is removed from school at Midsummer), and one of the sons, viz. Cyril Bexley. And, in the mean time, Sidney to be given into her charge for half the intervening time, viz. the first ten weeks Sidney to be with Mr. Vansittart, and the remaining period with Mrs. Vansittart, and Arthur also, if Mr. Vansittart does not object, and Alice to spend the Easter holidays with Mrs. Vansittart: Mr. Vansittart to have the custody of the other two sons, viz. Sidney Nicholas and Clement Arthur, should he desire it, on the daughter joining her mother. In the event of the death of either Alice Rosalie, or Cyril Bexley, or both, Mr. Vansittart to be at liberty to place either one \* 251 or both of the surviving children \* in their stead under her charge, but no reduction to be made in the allowance to Mrs. Vansittart. The children not to be sent to any school in Berkshire, or at a less sum than 60*l.* a year for each child. That neither Sidney nor Arthur be sent to any school without the written consent of both Mr. and Mrs. Vansittart, except the public schools at Harrow, Eton, Westminster, or Winchester, the naval*

academies, or Oxford or Cambridge University, when they shall have arrived at sufficient age. Those in the custody of Mrs. Vansittart to be instructed in the doctrines of the Church of England, and those above seven years of age to attend its worship, and to be taught the catechism as in the Book of Common Prayer, and should a resident governess or tutor be engaged, the same to be a Protestant. In case of illness of either of the children in Mr. Vansittart's charge, Mrs. Vansittart to have the care of such during the period of their illness, with a proper allowance. The holidays and half-holidays of the children who may be at school, to be equally divided between the two parents. If inconvenient to either parent to receive them at such times, they may remain during the whole of the holidays with the other parent. Both parents to have equal liberty to visit and to correspond with them while at school at all convenient times. Any of the sons who may be with Mrs. Vansittart, to be allowed to visit Mr. Vansittart for any space or spaces of time mutually convenient, not exceeding two months in a year, and the daughter, in like manner, not exceeding one month in a year; and in like manner those who may be with Mr. Vansittart. That a further sum of 40*l.* per annum be paid to Mrs. Vansittart for board and education of each child beyond the two which may remain with her, but no allowance to be made for occasional or holiday visits as above. That the allowance of 120*l.* per annum commence from the 1st day of this present month of March (Mr. Vansittart \* paying her \* 252 bills and other outgoings up to that day, not exceeding 30*l.*, besides 20*l.* due to her for furniture, as soon as the recent sale at White Waltham shall be completed). That the policy on the life of Mr. Vansittart for 1200*l.*, now in the possession of Mrs. Vansittart, shall be assigned over by Mr. Vansittart to her trustee for her sole and separate benefit. That the plate and linen be equally divided. That the deed assigning over to trustees the sum of 4000*l.* to be produced for Mr. A.'s inspection and assurance. That the deed of separation be approved by Dr. Addams on behalf of both parties; and any dispute which may arise thereon, or in the settlement thereof, be referred to and decided by him; and which deed is to be executed by all parties forthwith. That all the law charges be paid by Mr. Vansittart. Should Mr. Vansittart's income be augmented by a presentation or otherwise, one-third of such increase to be paid to Mrs. Vansittart; and vice

*verset*, should Mrs. Vansittart's income be increased from any other source, except under the wills of her father and mother, in which case Mrs. Vansittart to invest one-third of such additional income for the benefit of her children. That should Mr. or Mrs. Vansittart at any time take the children abroad, they should give written notice of such their intention to each other previous to doing so. We hereby agree to the above."

The bill then stated a long correspondence between the solicitors of the parties, to which it is not necessary to advert more particularly. The result was that the defendant repudiated the agreement as not binding upon him, and refused to execute a deed drawn up in pursuance of it. The bill prayed that the agreement might be declared binding upon him, and that he might be decreed to execute a deed in conformity with its terms. The  
 \* 253 \* defendant demurred, and Vice-Chancellor Wood having allowed the demurrer, (a) the plaintiff appealed.

*Mr. Rolt* and *Mr. Bilton*, for the plaintiff, in support of her appeal.—This case is not concluded by *Hope v. Hope*, (b) for the agreement in that case was open to weighty objections which do not apply here, one principal part of the arrangement there being a collusive proceeding for a divorce, and the facilitating the divorce being the main part of the consideration. The policy of the law as to separation deeds is shown in *St. John v. St. John*, (c) and *Wilson v. Wilson*. (d) If the husband and wife are living together, an agreement providing for a future separation is illegal; but if they are living apart, a deed regulating the terms on which the separation shall continue is *prima facie* legal, and, if made on good consideration, will be enforced. *Webster v. Webster* (e) illustrates the rule. Here the abandonment by the wife of the suit in the Ecclesiastical Court is a perfectly good consideration. *Elworthy v. Bird* (g) is similar in principle. It may be that the stipulations as to the children are not such as the Court would interfere to enforce, but that is no reason why their insertion should be held to make the agreement altogether void. In *West-*

(a) 4 Kay & J. 62.

(b) 5 W. R. 387. [4 De G., M. & G. 328, and notes.]

(c) 11 Ves. 532.

(e) 4 De G., M. & G. 437.

(d) 1 H. L. Cas. 558.

(g) 2 S. & S. 372.

*meath v. Westmeath*, (a) similar provisions were found in a separation deed, but that the deed was thereby made illegal never occurred to any one during the whole of the protracted litigation relating to it, the different steps of which will be found in 6 B. & C. 200, 1 Dow. & Cl. 519, and Sugd. \* Law of Real Property, 178. There is therefore no ground for saying that the deed, if executed, would be rendered wholly invalid by them. We only ask the execution of a deed conformable to the agreement, the greater part of which is not open to any objection on the ground of public policy, leaving the Courts hereafter to decide how far the terms of the deed can be enforced. *Lumley v. Wagner* (b) shows that relief such as is sought here may be granted. [*Jodrell v. Jodrell* (c) was also referred to.]

The *Solicitor-General* and *Mr. Dart*, for the defendant, were not called upon.

**THE LORD CHANCELLOR.**—This is a bill filed for specific performance of an agreement for a deed of separation between husband and wife. The bill was filed in July, 1857, and, upon argument, the Vice-Chancellor allowed the demurrer, and the case comes before us upon appeal from his decision.

From the statements in the bill, which must be taken by the demurrer to be admitted merely for the purpose of this case—and I mention this in order that it may not be assumed that there is any imputation on the husband from the allegation that the suit in the Ecclesiastical Court was instituted against him for cruelty and adultery—it appears that this suit had been instituted, and that it was pending, when a negotiation for a compromise took place, which resulted in the agreement in question. That agreement contains various stipulations providing for the maintenance and custody and care of the children, and their education, and with reference to after-acquired property both of the husband and wife.

\* The question comes before us, whether this is a fit \* 255 agreement of which to decree specific performance.

Separation deeds are contracts of a very peculiar kind, which are rather tolerated than sanctioned by law. They may be enforced in the Common Law Courts indirectly through the medium of covenants which are entered into between the husband

(a) Jac. 126. (b) 1 De G., M. & G. 604. (c) 9 Beav. 45.

and trustees, and in equity performance may be decreed where the stipulations are not contrary to law, or in contravention of public policy. But there is this peculiarity attendant upon contracts of this kind, that the very basis of them, namely, the agreement for separation, is one that cannot be enforced. No Court would restrain a suit by either husband or wife for a restitution of conjugal rights, after the execution of an agreement for a deed of separation, and if the deed only contained an agreement for separation, as was said by Lord ELDON in the case of *Westmeath v. Westmeath*, it would be invalid.<sup>1</sup> Therefore it is a contract of a very peculiar description, the very basis of which consists of a stipulation not obligatory on the parties, but which is a mere voluntary engagement determinable at their will. It is necessary, however, to distinguish between a deed of separation actually executed and a mere agreement for a separation. Supposing a deed to be actually executed, the Court would enforce any of its stipulations which were in accordance with law, although it might also contain others contrary to law or public policy. But when a question arises whether a Court of Equity will decree a specific performance of an agreement of this description, the whole of it must be taken into consideration, and all its provisions must be regarded. You cannot separate one portion of it from the other, and say we will

decree a specific performance of that part. It must be  
\* 256 taken in its entirety, and if there are any provisions in \* it  
which are contrary to law or to public policy, a Court of  
Equity cannot enforce the specific performance of it.

Now, then, we have only to look at this agreement to see whether it does contain any such stipulation, and I think, for this purpose, it is quite unnecessary to go further than to that portion of the agreement which relates to the children. By one of its provisions the father agrees to divest himself of the authority which belongs to him by nature, and which law and public policy impose upon him as a duty. It has been said, that there is nothing contrary to public policy in this, that a father may, if he pleases, divest himself of the authority which he possesses over his children and transfer it to another.<sup>2</sup> If the matter were *res integra*, I certainly should have a very strong opinion the other way, and that this is

<sup>1</sup> See *Westweath v. Westmeath*, 2 Kent (11th ed.), 176, n. (b), 2 Hagg. Eccl. Supp. p. 115.

<sup>2</sup> See cases cited in note (1), *ante*, 249.

opposed to a policy on which the best and dearest interests of society may depend. But this question, as it appears to me, has been decided more than once, and so completely, that it is impossible to come to any other conclusion than that this is a stipulation which could not be enforced by law. I will take the case that has been mentioned in the course of the argument of *St. John v. St. John*, (a) where Lord ELDON says: "Then, how is it as to the children? The father has control over them by the law, as the law imposes upon him, with reference to the public welfare, most important duties as to them. If the husband can contract with the wife, who cannot by law contract with him (and in this instance the contract as to the children is between the husband and wife only), it deserves great consideration before a Court of Law should, by *habeas corpus*, upon a unilateral covenant as the Scotch call it, take from him the custody and control of his children, thrown upon him by the law, not for \* his gratification, but on account of his duties, and place them against his will in the hands of his wife." In the cause of *Hope v. Hope* it is quite true there was an objection to the agreement, on the ground that the parties had made arrangements to facilitate a divorce, for which the wife was suing. But in that case the question as to the control and custody of the children was also considered in the judgment of this Court; and Lord Justice TURNER expressly adverted to that point and said: "The first article provided that Mr. Jean Henry Hope should remain under the custody of his mother, and the third, that Mrs. Hope should undertake not to oppose the suit for a divorce instituted by her husband. The first of these two provisions was in direct contravention of the order of the Lord Chancellor, and of the settled law and policy of the country. A father has, by that law and policy, the custody of his children and the control over them, and that not for his own gratification, but on account of his duties, and with reference to the public welfare." And in this case the Vice-Chancellor expressed the same opinion upon this stipulation as to the children. He says, "With respect to the children, there were certain stipulations which the Court could not enforce against the wife, even assuming that they were not against public policy. She was to have the custody of the children who were more than seven years old, and to have a benefit or obligation which she could not

(a) 11 Ves. 530.

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have obtained by a divorce. Very particular stipulations were also contained as to their education, their instruction in the Church catechism, their having a Protestant tutor or governess, all of which could not be enforced against her if she failed to observe them." But it is urged, on the part of the wife, that the Court might direct the deed to be executed, and then enforce or not enforce its stipulations afterwards. But what would be the object of directing the deed to be executed? It is quite clear

\* 258 \* that if the wife were to fail to fulfil those obligations which are to be imposed upon her under this agreement, for instance, that of educating the children in the religion which is professed by the husband, there would be no power in this Court to compel the wife to do her duty in that respect; and therefore if we were to direct the execution of the deed, we should be doing that which would be perfectly nugatory, as there would be no means whatever of enforcing those stipulations which may have been the consideration which induced the husband to agree to enter into it.

Then the question really comes to this: Where there is an agreement of this description, which it is admitted must be taken in its entirety, which is founded upon a consideration which is entire and cannot be separated, which, supposing a specific performance were decreed, could not be enforced if embodied in a deed, and where those stipulations are clearly, according to the opinion of the Court, contrary to law or public policy, can the Court be called upon to decree the specific performance of such an agreement, which would in fact be lending itself in some degree to the insertion of stipulations admitted to be illegal into a deed, and also directing a thing to be done which would be perfectly nugatory and impossible to be carried into effect.

These considerations lead me to the conclusion that the opinion of the Vice-Chancellor was well founded, and that this demurrer must be allowed.

THE LORD JUSTICE KNIGHT BRUCE. — The provisions respecting the children of the defendant form, perhaps, not the only objection of a fatal kind to the agreement in question; but being as \* 259 they \* are an important and inseparable part of the contract, are sufficient to destroy it. Of course the demurrer must be allowed, and, as I think, with costs, at least in this Court.

THE LORD JUSTICE TURNER.— In determining this case, I think it unnecessary to look at any thing beyond the provisions of the agreement as to the children ; I say nothing, therefore, upon the questions which have been suggested at the bar as to the capacity of the wife to sue, and as to the difficulty of enforcing the provisions of the agreement with respect to the children.

The father has not merely rights in respect of the children, but he has duties to discharge towards them ; and the question which I mean to refer to in the few observations I shall make on this case is whether it was competent to the father to fetter and abandon his parental power to the extent which by this agreement he has contracted to do ? By the agreement two of the children are to be placed entirely under the custody of the mother, and there is this further provision, that none of the children shall be sent to any school in Berkshire, or at a less sum than 60*l.* a year for each child ; and as to two others of the children, that neither of them shall be sent to any school without the written consent of both the father and the mother. Whatever, therefore, may be the father's judgment under any altered circumstances of these children, as to the mode in which they ought to be educated, according to the provisions of this agreement he is to be bound not to act upon that judgment for the benefit of the children, unless his wife consents. That is a provision which, in my opinion, is repugnant entirely to his parental duty. The argument \* has been, \* 260 that you may insert these provisions in the deed, but that, if they are against the parental right, no Court will enforce the execution of them. That may be so. But the question we have to consider is whether this Court will be instrumental in putting the parties in a position in which they may act upon such provisions ? And I apprehend that if this Court is satisfied that the provisions are not such as ought to be introduced for the purpose of qualifying and fettering the parental power, if they tend to fetter that power to an extent which may affect the policy of the law, this Court will not in any way be instrumental in carrying into effect such an agreement.

It has been said that there are cases of this Court's enforcing the execution of separation deeds, and I believe that there are such cases, although the point was not perhaps entirely set at rest until the decision of the House of Lords in *Wilson v. Wilson* ; since that case, however, I agree that we must take it to be the settled rule

that the Court will enforce specific performance of agreements for separation, and of course the deed to be executed must contain covenants for that separation which are necessary incidents.<sup>1</sup> Then it is said, why not decree the execution of a deed which shall contain not only those provisions, but other provisions which the Courts will not enforce? The answer is we are bound by authority to the extent of the case of *Wilson v. Wilson*, the House of Lords has so determined; but we are now called upon to carry that authority further, and to enforce an agreement which contains other provisions repugnant to the policy of the law in other respects. I am not prepared to go that length; I am of opinion it would be inexpedient to do so. I think, therefore, that this demurrer must be allowed.

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\* 261 \* TINKLER v. The BOARD OF WORKS for The WANDSWORTH DISTRICT.

1858. January 26, 27. March 12. Before the LORDS JUSTICES.

A district board of works acting under the Metropolis Local Management Act, 18 & 19 Vict. c. 120, made an *ex parte* order on the plaintiff to turn into water-closets the privies attached to certain cottages belonging to him, and, on his failing to do so, they proceeded to enter upon the premises for the purpose of doing it themselves. The order appeared to have been made, not with regard to the state of this particular property, but in consequence of a previous determination to substitute water-closets for privies throughout the district. *Held*, that the board were exceeding their statutory powers, and ought to be restrained from entering on the plaintiff's property for the purpose of making the alteration.<sup>2</sup>

Per the Lord Justice TURNER. — Assuming that the Act authorizes a board to require such an alteration as the above in particular cases, still the board is bound to exercise its discretion in each particular case, and is acting *ultra vires*, if, without exercising such discretion, it proceeds to make the alteration in pursuance of a determination to require it to be made in all cases.

<sup>1</sup> See *Florentine v. Wilson, Hill & Denio* (N. Y.), 303; *Wilson v. Wilson*, 5 H. L. Cas. 59; *Schouler Dom. Rel.* 292-294; *Albee v. Wyman*, 10 Gray, 227, per DEWEY J.

<sup>2</sup> See Kerr Inj. 296-298, 572; 2 Dan. Ch. Pr. (4th Am. ed.) 1650, and cases in notes (1) and (2), and App. p. xxii.; *Attorney-General v. Colney Hatch Lunatic Asylum*, L. R. 4 Ch. Ap. 146; *Oldaker v. Hunt*, 6 De G., M. & G. 376, and note (2); *Broadbent v. The Imperial Gas Company*, 7 De G., M. & G. 436, and cases in note (3).

THE question in this case was as to the right of the defendants, the Wandsworth Board of Works, to enter upon property belonging to the plaintiff, for the purpose of changing into water-closets certain privies attached to the cottages on the land, and alleged by the defendants to be nuisances.

The following statement of the facts of the case is taken almost entirely from the judgment of the Lord Justice TURNER.

The plaintiff held under a lease for lives a piece of land situate within the district of the Wandsworth Board of Works, and upon which there stood a block of thirty-nine cottages called Ford's Buildings. On the 27th of January, 1857, he was served by the defendants, the Wandsworth District Board of Works, with the following notice :—

" Metropolis Local Management Act, 18 & 19 Vict. c. 120 ; Nuisances Removal and Diseases Prevention Act, 18 & 19 Vict. c. 121. The Board of Works for \* the Wandsworth \* 262 District. Offices, Bolingbroke House, Wandsworth Common.

" Whereas at a meeting of the Board of Works for the Wandsworth District, holden on the 24th day of December, 1856, it was duly made to appear to the said board of works that the houses and premises situate and being as hereinafter mentioned require certain works to be executed thereto, which are more particularly set forth in the schedule hereunto annexed, and which works are requisite and necessary for the removal and abatement of the nuisance now existing, and which is injurious to the health of the persons dwelling in or near unto the said houses and premises ; and whereas it was duly ordered by the said board of works, that notice in writing be given to the owner or occupier of the said houses and premises, requiring him to do, perform, and execute the works, matters, and things, hereinafter mentioned or enumerated, and that the said owner or occupier do commence the execution of the said works, matters, and things, on or before the day mentioned in the said schedule, I am directed to inform you that unless the said works are commenced on or before the day mentioned in the said schedule, and forthwith completed to the satisfaction of the said board, that compulsory proceedings will be taken under the above-mentioned Acts of Parliament for executing

the said works, and for the recovery from you of all costs and expenses incurred thereby.

“ Dated this 27th day of January, 1857.

“ By order of the Board of Works for the Wandsworth District.

“ SAMUEL STEEL,  
“ *Inspector of Nuisances to the  
Board of Works for the  
Wandsworth District.*”

\* 263 \* The schedule annexed to this notice was in these terms : —

“ Nuisances now existing upon the said houses or premises : —

“ Cesspool overflowing and no dust bins.

“ Works required to be done for the removal and abatement of the nuisance : —

“ Cesspools to be emptied and filled up.

“ Drains from privies and sinks constructed.

“ Privies to be panned, trapped, and water-supply apparatus provided.

“ Cisterns to be provided.

“ Lime-white where necessary.

“ Pavements to be made good.

“ Dust bins to be provided.”

In consequence of this notice the plaintiff executed some of the works mentioned in the schedule, but he did not pan or trap the privies or provide water-supply apparatus, or, so far as appeared, cisterns ; in other words, he did not convert the privies into water-closets. It was not clear upon the evidence, whether he completed all the other works required by the notice ; there was a dispute as to whether he completed the dust bins. No order from justices of the peace had been obtained by the defendants under 18 & 19 Vict. c. 121.

The privies not having been converted into water-closets, the defendants on the 8th of June, 1857, served upon the plaintiff the following notice : —

“ Metropolis Local Management Act, 18 & 19 Vict. c. 120, the Nuisances Removal and Diseases Prevention Act, 18 & 19 Vict. c.

121. The Board of Works for the Wandsworth District. Offices, Bolingbroke House, Wandsworth Common.

"No. 64. To Mr. Bacon of Ford's Buildings.

\* "Notice having been served upon you by order of the \* 264 Board of Works for the Wandsworth District to do certain works upon the premises situate Ford's Buildings, York Road, in the parish of Battersea, and the time mentioned in such notice having expired without such works having been completed, the Board of Works for the Wandsworth District hereby give you notice, that their workmen, or the workmen of their contractor, will enter upon the said premises to commence and forthwith execute the said works on or after the expiration of seven days from the service hereof, and that the board will then adopt the course which the law provides for enforcing the payment of all costs and expenses thereby incurred.

" Dated the 8th day of June, 1857.

"By order of the Board of Works for the Wandsworth District.

"SAMUEL STEEL,

"*Inspector of Nuisances for the parish  
of Battersea, No. 3, Somerset  
Terrace, Church Road.*

"Notice of your intention to commence these works must be given in writing at least twenty-four hours before commencing."

The plaintiff, upon the receipt of this second notice, placed the matter in the hands of his solicitors, who immediately wrote to the defendants to the effect that the plaintiff considered that he had done all that the premises required, or the law rendered imperative; but the defendants in reply insisted that the terms of the notice should be strictly complied with, and on the 7th of November they entered on the premises, commenced removing the earth at the rear of one of the cottages, and deposited a number of pans, and a quantity of piping, in some of the cottage gardens, and on the 9th of November \* their workmen commenced \* 265 the works necessary for converting the privies into water-closets. The plaintiff then on the 11th of November, 1857, filed the bill in this cause, praying, that the defendants, and all persons acting under their orders or directions, might be restrained by the injunction of the Court from entering or digging in or upon the premises, or any part thereof, or removing the earth

therefrom, and also from interfering with, pulling down, or converting the privies attached to the cottages, or any of them, into water-closets, and that the defendants might pay the plaintiff his costs of the suit.

It was alleged by the fifth paragraph of the bill, that in consequence of the notice of January, 1857, the plaintiff, upon the 4th of February, 1857, went to the defendants, and stated to them that no inconvenience, unwholesomeness, or nuisance arose from the privies, that the occupiers of the cottages were satisfied with them, and that the conversion of them into water-closets would, in all probability, occasion unpleasant smells and be found inconvenient, and be far worse than the privies; that water-closets would be perpetually getting out of order, and, moreover, there was no sewer for the drains required by the notice to fall into; that the defendants, by their chairman, then stated to the plaintiff, that it was their intention to do away with all privies whatsoever, and that they would have none in their district, or used words to that effect, and that they would construct a sewer within a short distance of the premises, so that the drains required by the notice might have a proper outlet; and that, on the plaintiff observing that it would be better for him to defer the construction of the drains until the sewer was made, the defendants refused to consent thereto. These

allegations were verified by the affidavit of the plaintiff, and \* 266 were not contradicted, and the evidence of \*the defendants showed that the board intended to do away with the privies, and substitute water-closets all over the district.

On 19th November, 1857, Vice-Chancellor STUART granted the injunction as prayed by the bill until answer or further order, the plaintiff undertaking to proceed at his own expense to construct proper and sufficient works and conveniences on the premises in the bill mentioned, so as not to be objectionable as a nuisance, or liable to removal under any proceeding before a justice or justices of the peace under the 12th, 13th, and 14th sections of the 18 & 19 Vict. c. 121, with liberty to either party to apply.

The defendants appealed from this order, and the appeal motion was opened before the Lords Justices on 5th December, 1857, but, at the suggestion of the Court, it was arranged that it should stand over, and that their Lordships should hear the cause, and dispose of it along with the appeal motion. The cause being ready for hearing came on with the motion on 26th January, 1858.

*Mr. Bacon* and *Mr. Schomberg*, for the plaintiff.—The notices on the face of them claim to derive efficacy from the 18 & 19 Vict. c. 121; but the defendants cannot justify themselves under that Act, for they could not under that Act, § 11, enter to do the works they propose, without first obtaining an order from justices of the peace under the 12th section, which they have not done. The defendants then rest their case on the 18 & 19 Vict. c. 120, though, as they are complaining that there is a nuisance, they ought to proceed under the other Act, which gives express directions as to nuisances, and *pro tanto* repeals the earlier one. But supposing that they have a right to proceed under c. 120, that Act does not authorize their doing what they seek to do. \* 267 The 81st and 85th sections (a) on which

(a) "LXXXI. After the commencement of this Act, it shall not be lawful newly to erect any house, or to rebuild any house pulled down to the extent aforesaid, within any parish mentioned in schedule (A) to this Act, or any district mentioned in schedule (B) to this Act, without a sufficient water-closet or privy and ash-pit, furnished with proper doors and coverings, and also furnished, as regards the water-closet, with suitable water supply and water-supply apparatus, and with suitable trapped soil-pan, and other suitable works and arrangements, so far as may be necessary to ensure the efficient operation thereof, and whosoever shall offend against this enactment shall be liable to a penalty not exceeding 20l.; and if at any time it appear to the vestry or district board of such parish or district, that any house in any such parish or district, whether built before or after the commencement of this Act, is without a sufficient water-closet or privy and ash-pit, furnished with proper doors and coverings, and with other apparatus and works as aforesaid, the vestry or district board shall, in case the same can be provided without disturbing any building, give notice in writing to the owner or occupier of such house, requiring him forthwith, or within such reasonable time as shall be specified in such notice, to provide a sufficient water-closet or privy and ash-pit so furnished as aforesaid, or either of them, as the case may require; and if such notice be not complied with, it shall be lawful for the vestry or district board to cause to be constructed a sufficient water-closet or privy and ash-pit, or either of them, or do such other works as the case may require, and to recover the expenses incurred by them in so doing from the owner of such house, in manner hereinafter provided: provided always, that where a water-closet or privy has been and is used in common by the inmates of two or more houses, or, if in the opinion of the vestry or district board, a water-closet or privy may be so used, they need not require the same to be provided for each house."

"LXXXV. If upon such inspection as aforesaid any drain, water-closet, privy, or cesspool appear to be in bad order and condition, or to require cleansing, alteration, or amendment, or to be filled up, the vestry or board shall cause notice in writing to be given to the owner or occupier of the premises, upon or

\* 268 \* they rely enable them to compel the plaintiff to put his premises into proper order, but do not authorize their compelling him to substitute water-closets for privies, thus putting him to the expense of procuring as he best may the requisite supply of water ; still less do they authorize the making such orders as have here been made *ex parte*, without regard to the circumstances of the particular property, and in pursuance of a general resolution to substitute water-closets for privies all over the district. An Act of this kind, giving a public body large powers of interfering with the rights of property, is, according to the settled rule, to be construed strictly ; and the 73d, 81st, 82d, 83d, 84th, and 85th sections of the Act all show that the legislature looked upon privies as things which were to continue.

*Mr. Malins* and *Mr. W. D. Lewis*, for the defendants.—The 18 & 19 Vict. c. 121, does not interfere with the authorities of the board under 18 & 19 Vict. c. 120, for the particular powers given by the one Act are not abrogated by the general powers given by the other. *London and Blackwall Railway Company v. Limehouse District Board of Works.* (a) We are within the saving in sect. 43 of the former Act. It is complained, that we made an order *ex parte*, but the language of the 81st and 85th sections does not point at the party's being heard, and the 82d implies that the board may proceed *ex parte*. If the plaintiff feels himself aggrieved, he has under the 211th section a simple and cheap remedy by appeal to the metropolitan board, which is made

\* 269 by the Act the \* sole Court of appeal in these cases.

[THE LORD JUSTICE TURNER.— Suppose the local board say, that a privy is in bad condition, and call upon the owner to put it in good condition. He does nothing. The board thereupon enter and do what they consider necessary, and bring an action against the owner for the expenses. Would it or would it not be a good defence to show that the privy was from the first in good order ?

in respect of which the inspection was made, requiring him forthwith, or within such reasonable time as shall be specified in such notice, to do the necessary works, and if such notice be not complied with by the person to whom it is given, the vestry or board may, if they think fit, execute such works, and the expenses incurred by them in so doing shall be paid to them by the owner or occupier of the premises."

(a) 3 K. & J. 123.

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If it would, can you say, that the Courts have no jurisdiction in these cases? ]

We submit that such a defence would not be good. Where the amount of expense is the only point in dispute, the 225th and two following sections provide a tribunal for ascertaining it; but on the question, whether the work is to be done or not, we submit that there is no appeal but to the metropolitan board. Public bodies while acting within their statutory powers cannot be interfered with on the ground that they are not exercising a sound discretion in their proceedings. *Frewin v. Lewis*, (a) *Stainton v. Woolrych*, (b) *Kerrison v. Sparrow*. (c) The legislature assumes, that a body, constituted like ours for the public benefit, and without any personal interest in the matter, will not abuse its powers, and they are therefore made extensive. The words of sections 81 and 85 interpreted by the context, especially by section 83, fully authorize such an alteration as the substitution of water-closets for privies, if the board think it advantageous.

*Mr. Bacon*, in reply.—The 83d section does not help the defendants. Under section 81, a house must have a water-closet or privy, and if a water-closet, there must be a sufficient water supply, and the 88d section agrees with this, but does not at all extend the other sections as to authorize the \* board \* 270 to require a water-closet and water apparatus to be constructed instead of a privy. Even if such a requisition is authorized by the Act, it can only be where the circumstances of the particular property make it desirable.

Judgment reserved.

March 12.

THE LORD JUSTICE KNIGHT BRUCE.—In this case, the entry on the plaintiff's land, and the acts there done by the defendants' order, which formed the groundwork of the suit, and of the interlocutory order under appeal, are shown, I think, to have taken place in consequence and prosecution of an intention on their part to substitute on the land a number of water-closets (more than

(a) 4 M. & C. 249. (b) 23 Beav. 225. (c) G. Coop. 305.

[ 215 ]

thirty altogether) for an equal number of ordinary privies now and at that time there, and to do so *nolente volente* the plaintiff. And it is, I apprehend, clear, that unless the defendants had lawful power to do so, the suit was well founded and the injunction right.

The defendants claimed and claim that power solely under the 120th and 121st chapters of the 18th & 19th of the Queen, often mentioned, and of necessity much discussed, during the argument, but especially the 81st and 85th sections of c. 120. Remarkable as some of the provisions of that Act seem to me to be, I am of opinion, that they do not deal with rights of property in such a way as the defendants contend that they do, nor can I find in the two statutes or either of them any warrant for what the defendants have been attempting and now insist on.

The question is not whether they had power to cause or \* 271 order privies within their district to be put into a \* proper and decent state, if not in that state, but is, whether they have the right or power to force on the plaintiff the mechanical contrivance of water-closets with their requisites (for which he is to find a water supply as best he may), instead of the privies, which, sufficient as privies, if kept in the condition proper for such conveniences, are on his land for the purposes of his cottages there. The claim of the defendants in this respect appears to me manifestly groundless, and I should have thought so had they begun their operations after giving the plaintiff an opportunity of being heard and of producing testimony in defence of himself, had they regulated themselves by analogy to judicial proceedings, had they deemed it reasonable to hear both sides ; but, as matters were conducted, there has perhaps been a double error, though on this point I do not mean to speak as having formed an opinion, nor do I mean to intimate an impression how the case might possibly have stood, had there been (as there has not been) any order of a justice or justices of the peace relating to the work or to the privies ; the right, however, or power of "appeal" given by the 211th and 212th sections of c. 120, upon which stress was laid in the argument, appears to me not at all to prejudice or affect the plaintiff.

The cause being now before us for hearing as well as on the appeal motion, the defendants ought, I think, to be ordered to pay the costs of the suit, and have the injunction continued against them, with liberty to apply. I so express myself, because by pos-

sibility there may hereafter be some lawful occasion for them to enter by their servants or agents on the land.

The Lord Justice TURNER after stating the facts of the case proceeded as follows: The notices served by the defendants upon the plaintiff \* on the 27th of January and the 8th of \* 272 June, 1857, purport to be given under the Metropolis Local Management Act, 18 & 19 Vict. c. 120, and the Nuisances Removal and Diseases Prevention Act, 18 & 19 Vict. c. 121, and are intituled under both those Acts, but it seems to me to be clear that the defendants cannot justify their proceedings in this case under the latter Act. That Act gives no authority to enter upon any premises in such a case as the present, except in the event of disobedience to an order of justices, and there has been here no order of justices. If, therefore, the case of the defendants can be at all supported, it must be under the Metropolis Local Management Act, and it was indeed upon that Act the defendants relied.

The 81st and 85th sections of the Act are as follows [his Lordship read those sections]: and it was argued on the part of the defendants, that this case fell within those sections. The argument was this: that it was sufficient to bring the case within the sections, and especially within the 81st section, if it appeared to a district board, that a house was without a sufficient water-closet or privy and ash-pit, and that, in the event of its so appearing to a district board, they were justified in requiring a sufficient water-closet or privy and ash-pit to be provided; that they were constituted by the Act the sole judges of the sufficiency, both of what was in existence and of what ought to be required; that if their judgment was wrong, the remedy was by an appeal under the 211th section of the Act against the orders founded upon it; and that if the case falls within the Act the jurisdiction of this Court is excluded. Whether this conclusion is well founded, and whether the powers given by this Act are such as that no abuse of them could be committed which would warrant the interference of this

\* Court, I do not intend to give any opinion whatever, for \* 273 the defendants' argument plainly rests on the hypothesis that the case falls within the Act, and I am of opinion that this case does not fall within it. I take it to be fully established by the evidence before us, that the orders issued by the defendants proceeded upon the footing that there should be no privies in their

district, that all the privies there should be turned into water-closets, and that this resolution had been come to before these orders were issued and without reference to the present case. This, I think, plainly appears not only from the affidavit of the plaintiff, to which there is no contradiction, but also from the affidavits of Mr. Corsellis on the part of the defendants. Now, whatever may be the power given by this Act to the local authorities to order a water-closet to be provided instead of a privy in particular cases in which that alteration may be required, and assuming, without however meaning to decide, that the Act gives such a power, I think that upon the true construction of the Act, and viewing it in the light most favourable to these defendants, they were bound to exercise their discretion in each particular case; that it was not competent to them to lay down any such general rule as that on which they have acted; and that in acting on that rule they have exceeded the powers given to them by the Act. I think, therefore, that these orders were in this respect illegal and void, and the defendants having plainly entered upon the premises for the purpose of giving effect to this part of the order, I think it unnecessary to enter into the question of the alleged non-completion of the other works or into the other sections of the Act which were referred to in the course of the argument. These orders being *ultra vires* the argument upon the appeal clause of course falls to the ground.

I am of opinion, therefore, that there must in this case  
\* 274 \* be a decree for the plaintiff, according to the prayer of the bill, and with costs.

I observe that Mr. Corsellis, in one of his affidavits, speaks of carrying out the spirit of the Act. It may be as well therefore to caution these defendants, that, intrusted as they are by this Act with very extensive powers it is their bounden duty to keep strictly within those powers, and not to be guided by any fancied view of the spirit of the Act which confers them.

\*In the Matter of the HULL AND LONDON LIFE \* 275  
ASSURANCE COMPANY and the HULL AND LON-  
DON FIRE INSURANCE COMPANY.

In the Matter of the JOINT STOCK COMPANIES WINDING-  
UP ACTS 1848 and 1849.

GIBSON'S CASE.

KEMP'S CASE.

HUDSON'S CASE.

1858. March 3. Before the Lord Chancellor Lord CHELMSFORD and the  
LORDS JUSTICES.

Where the appellants had been induced to execute the deed of settlement of a company as shareholders, by a representation made by promoters of the company (who were intrusted with the deed for the purpose of obtaining signatures to it) that two specified individuals would execute it, and this representation, although honestly made, proved erroneous: *Held*, that it was not sufficient to exonerate the appellants from liability as shareholders.<sup>1</sup>

*Quare*, how far directors can be regarded as the agents of a company for the purpose of making false representations by which the shareholders or the public are deceived.<sup>2</sup>

Brockwell's case, 4 Drewry, 205, observed upon.

THIS was an appeal from a decision of the Master of the Rolls, retaining the names of the appellants Messrs. Gibson, Kemp, and

<sup>1</sup> See *Hallows v. Fernie*, L. R. 3 Ch. Ap. 467; 2 Lindley Partn. (Eng. ed. 1860) 790, 1106, 1107–1109. Generally parol representations or agreements made at the time of subscribing for stock, and inconsistent with the written terms of subscription, are inadmissible and void, unless fraud is shown. *Angell & Ames Corp.* (9th ed.) § 531 and cases cited in notes to this point; *Piscataqua Ferry Company v. Jones*, 39 N. H. 491.

<sup>2</sup> See 1 Lindley Partn. (Eng. ed. 1860) 235, 258–260; *Angell & Ames Corp.* (9th ed.) § 531 and notes; *Smith v. Reese River Company*, L. R. 2 Eq. 263; S. C. L. R. 2 Ch. Ap. 604; L. R. 4 H. L. 64; *Ross v. Estates Investment Co.*, L. R. 3 Ch. Ap. 632; *Rawlins v. Wickham*, 3 De G. & J. 304; *Central Railway Co. of Venezuela v. Kisch*, L. R. 2 H. L. 99; S. C. 3 De G., J. & S. 122, and notes; *Kennedy v. Panama, &c.*, *Mail Co.* L. R. 2 Q. B. 580.

Hudson on the list of contributories to the Hull and London Life and the Hull and London Fire Insurance Companies.

Mr. Gibson, by his affidavit in support of the appeal, stated, that in June, 1855, Mr. Preston, who was one of the promoters of the companies, called upon the deponent, and invited him to become a shareholder, and to act as a director of them, mentioning the names of several gentlemen of great respectability and wealth in London and Hull who, he said, had agreed to become shareholders and directors, and that amongst others he mentioned Mr. Anthony Davies of London, and Mr. George Cammell and Mr. Charles Horncastle of Hull, the two last of whom were known to the deponent as fellow townsmen and gentlemen of good means

\* 276 and respectability ; \* that, upon the faith of these statements, the deponent consented to take shares, and act as a director ; that in the month of April, 1856, Mr. Preston brought the deeds of settlement of the said companies to the deponent for his execution, when, observing that neither Mr. Cammell nor Mr. Horncastle had signed the deeds, the deponent demurred to sign them until they should be signed by Mr. Cammell and Mr. Horncastle, and that thereupon Mr. Preston stated to the deponent, that Mr. Cammell and Mr. Horncastle would sign the deeds and act as directors ; that the deponent on the faith of these statements of Mr. Preston executed the deeds ; that on the 27th of May, 1857, Mr. Preston called on the deponent and informed him, that Mr. Cammell and Mr. Horncastle had refused to take shares or have any thing to do with the companies, or to execute the deeds, and that owing to such refusal on the part of these gentlemen, considerable difficulty had arisen in forming a meeting of the directors of the said companies to elect directors ; that Mr. Preston then urged the deponent to go to London in order to form a meeting of the directors of the companies, which the deponent declined to do, expressing his determination to have nothing to do with the companies, and stating that he had been misled by Mr. Preston's statements made when the deponent executed the deeds, and that, had the deponent known that Mr. Cammell and Mr. Horncastle would not have joined the companies, the deponent would not have consented to join the companies, or have executed the deeds himself ; that on the 27th of May, 1856, the deponent saw Mr. Kemp, one of the other appellants who had consented to join the companies under similar circumstances, and talked over the subject with

him, and that they both determined to have nothing to do with the companies ; that on the 28th of May, 1856, Mr. Kemp wrote a letter to Mr. Preston which the deponent saw and approved \* of, and which fully conveyed the deponent's own \* 277 determination and sentiments, to the effect that the deponent had determined to withdraw from the companies, on account of the positive refusal of Mr. Cammell and Mr. Horncastle to execute the deeds of settlement and act as directors, and desiring, that this determination should be communicated to the board of directors in London ; that the deponent afterwards saw Mr. Preston, and informed him of the deponent's determination to have nothing further to do with the companies, and that Mr. Preston undertook to inform, and as the deponent believed, did inform, the board of directors of such determination ; that Mr. Preston also informed the deponent, that as the deponent had acted upon erroneous information given to him by Mr. Preston (though Mr. Preston had at the time believed the same to be true) he (Mr. Preston) would have the shares put opposite the deponent's name in the deed of settlement transferred to himself, in order that the deponent might have no more trouble in respect of such shares, and that the deponent had been informed by Mr. Preston, that in June, 1856, Mr. Preston required such shares to be transferred to him, and had several times afterwards repeated such request ; and that the deponent never, until a short time previously to the order for winding up the companies, heard any more about the matter.

Mr. Kemp's affidavit, which was to a similar effect, set out the letter sent by him to Mr. Preston. It was as follows :—

“ 33, George Street, Hull,  
“ May 28th, 1856.

“ Dear Sir,— I have since my interview with Mr. Gibson last night reconsidered the subject of the board meeting in London, and come to the conclusion that I will not depart from the course upon which I had previously \* determined. My \* 278 signature of the deed was done *pro forma*, without any sufficient knowledge of its contents, without the intention of ever acting as a director, with the distinct understanding that Mr. Cammell and Mr. Horncastle would sign it, and under the impression that the shares were 10*s.* each. What I did, I did from the most disinterested motives of friendship, and I sincerely trust that

I shall not be allowed to suffer for it. I have finally resolved not to take another step in the business, and as Mr. Cammell positively declines to act as director, consider that the company, so far as Hull is concerned, is defunct. I am also fully persuaded, that no class of men in Hull can be advised to embark in the enterprise. This state of things should be candidly communicated to the gentlemen in London, so that if they persevere in the undertaking, they may know that they do so on their own responsibility.

“I remain, dear Sir,

“Yours sincerely,

“H. W. KEMP.”

Mr. Hudson's affidavit was of a similar kind, but the representation made to him was made by another of the promoters named Turner, who had stated to him, after discovering that Mr. Cammell and Mr. Horncastle would not execute the deeds, that he (Mr. Turner) would have the shares for which Mr. Hudson had signed the deeds of settlement transferred to himself. At Mr. Turner's request, Mr. Hudson afterwards executed a transfer to Mr. Turner of the shares.

The cases thus set up were supported by affidavits made by Mr. Preston and Mr. Turner, who deposed that when they represented that Mr. Cammell and Mr. Horncastle would execute the deed and become directors, they verily believed that those gentlemen would do so.

\* 279 \* It appeared that thirty-six other shareholders had executed the deed after it had been executed by the appellants, and that one of the appellants had signed the formal document required for complete registration, certifying that the deed had been executed by the requisite proportion of shareholders, the execution of it by the appellants having completed that proportion.

*Mr. R. Palmer* and *Mr. W. Bovill*, in support of the appeal.—The only contract on the part of the appellants to become shareholders was made with or through the agency of the promoters, Mr. Preston and Mr. Turner, with whom they negotiated, and who were intrusted by the company with the deed of settlement for the purpose of procuring its execution. The company only obtained the execution of the deed by the appellants by means of the representations made by their agents, Mr. Preston and Mr. Turner, and

consequently could not take advantage of the contract so obtained, when it appeared that the representations so made were not in fact correct. The appellants agreed to become members of a company, of which Mr. Cammell and Mr. Horncastle were to be members, and not of any other company. If after learning that the company did not answer the description which had been given to them of it, by its authorized agents, the appellants had acted as shareholders, that circumstance might have brought the case within some of the authorities on the subject of acquiescence, but they at once repudiated the contract into which they had entered expressly on condition only, as soon as they found that the condition had not been fulfilled.

\* They referred to *Lord Mansfield's Case*, (a) *Bell's Case*, (b) *Holt's Case*, (c) *Ginger's Case*, (d) *Brockwell's Case*, (e) and *Morgan's Case*. (g)

*Mr. Selwyn* and *Mr. Roxburgh*, for the official manager. — The authorities referred to are clearly distinguishable from this case. In Bell's case the company was really at an end when it represented itself by means of prospectuses (which the Master of the Rolls thought proceeded from the company itself) to be carrying on business. In Holt's case, where the representation did not proceed from the company, it was held not to have exonerated the contributory, and the Master of the Rolls there explained fully the ground of his decision in Bell's case. In Brockwell's case fraudulent accounts had been published by the company itself, so that the representations upon which Mr. Brockwell had been induced to join the company were those of the whole body, a distinction which was acted upon by the House of Lords in *Burnes v. Pennell*. (h) The appellants, by subscribing their names, induced others to join the company, and indeed by so doing completed the amount of subscriptions required for complete registration, one of them signing the usual certificate for that purpose. Moreover the negotiation for a transfer of the shares was a waiver of any objection to the original subscription.

(a) 3 De G. & Sm. 58.

(e) 4 Drew. 205.

(b) 22 Beav. 35.

(g) 1 De G. & Sm. 750.

(c) Ibid. 48.

(h) 2 H. L. Cas. 497.

(d) 5 Ir. Ch. & Com. L. 174.

They also referred to *Bernard's Case*, (a) *Davidson's Case*, (b) *Holt's Case*, (c) *Preston v. Grand Collier Dock Company*, (d) and *Williams v. Page*. (e)

\* 281 \* *Mr. R. Palmer*, in reply.—The appellants were not liable in equity as members, or at all events might, on filing a bill, have been relieved from all liability.

[THE LORD JUSTICE KNIGHT BRUCE.—Could they have filed such a bill after others had subscribed on the faith of their having done so?] The shareholders who subscribed after them, supposing those subsequent shareholders to have been influenced by the signature of the appellants, might also have been relieved, if they had applied. Their not having sought relief cannot prejudice the appellants. Perhaps they were not induced to sign by the appellants' signatures, and as they would have had to show that they were, to make the appellants' removal a ground for theirs, that might have been the reason of their not seeking relief; for the misrepresentation, in order to be a ground for rescinding a contract, must have led to it being entered into; it must, as was said in *Burnes v. Pennell*, be "dolus dans locum contractui." To the appellants a positive assurance was given, without which they would not have signed, and which led to their signing. And it was given by persons to whom the deed was delivered by the company for the purpose of obtaining signatures.

THE LORD CHANCELLOR.—This is an appeal from the decision of the Master of the Rolls confirming an order of the Master, by which he retained upon the list of contributories, as made out by the official manager, the names of three gentlemen, named Gibson, Kent, and Hudson, and the question is, whether their names were properly so retained.

I think that there is no substantial distinction between the three cases, but that they all can be disposed of together.  
 \* 282 \* It appears that all three appellants executed the deed of settlement, whereby they became, *prima facie*, shareholders, members of the company and contributories. But it is said, that

- (a) 5 De G. & Sm. 283.
- (b) 3 De G. & Sm. 21.
- (c) 1 Sim. N. S. 389.

- (d) 2 Rail. Cas. 335.
- (e) 24 Beav. 654.

although they executed the deed, they were induced to do so, not indeed by false representations, but by representations held out and believed to be well founded and true by two of the promoters of the company, that certain gentlemen of evident respectability, named Cammell and Horncastle, would subscribe the deed, and that it turns out that the persons who made that material representation were deceived in their expectations, and that Messrs. Cammell & Horncastle have not executed the deed. It is alleged by these parties, who are sought to be made contributories, that they, at an early period, repudiated all liability on the ground of having been enticed by the representation thus made to them, and that they on that ground alleged, that they were never members of the company, and therefore cannot be made contributories.

I do not desire to lay down any general principle, inasmuch as cases are now *sub judice* which may come by appeal before this Court in which the general principle may have to be discussed, and I therefore desire to confine myself to this particular case. It may, however, be proper just to glance at the well-founded distinction on both sides insisted upon, between representations made by individual members of the company and by the company itself, or its agents. There is no doubt that if a person has been drawn in by the misrepresentations of an individual member of the company, he cannot exonerate himself from liability by reason of such false representation. If he has any remedy, it is against the individual shareholder who has deceived him. With respect to misrepresentations by the company itself, or its agents, the case would be different; but there has always appeared \* to me \* 283 to be great difficulty in establishing such a case. The company is represented by its directors who, for certain purposes, are its agents, but the difficulty is in saying that they are its agents for the purpose of making false representations.

In Brockwell's case there were false and fraudulent balance-sheets and reports circulated to the world, by which persons were induced to become members of the company, or to increase their risk in it; and it has been contended on the authority of that case, that where persons are deceived into becoming members on false representations held out by the directors, they are not liable as contributories. On this I cannot help observing, that with regard to fraudulent balance-sheets and reports, these are matters falling within the peculiar duties of the directors themselves, and that

there appears considerable difficulty in regarding them as the acts of the company, inasmuch as the directors are required by the Act of Parliament, and by the company's deed, half-yearly to lay before the shareholders, true and faithful balance-sheets. I therefore wish to guard myself against being considered as acceding to the proposition, that directors are to be regarded as the agents of the company for the purpose of making representations by which the public or the shareholders are deceived.

In the present case, however, there appears no ground whatever for saying that the appellants are not contributories. In the first place, it is extraordinary that their consent to become members of the company having been given entirely in consequence, as it is said, of the representation that two other persons would join the

undertaking, they should have chosen to trust implicitly to

\* 284 that representation, and without any further inquiry \* to execute the deed. Unquestionably the representation made to them, although not true, was not fraudulent, but was made in an honest expectation that Mr. Cammell and Mr. Horncastle would become shareholders. The deed was executed by the appellants after several other persons, but also before several more had signed it. It was argued by *Mr. Roundell Palmer* that if these last-mentioned persons had been drawn in by the circumstance of the appellants having signed the deed, they might, by immediately afterwards filing a bill to be relieved from the contract, have obtained such relief. I believe, and I speak with more confidence because the Lords Justices agree with me in thinking, that *Mr. Palmer* is in error in so stating. I think that such a bill would not be successful.

Now, what happened after their signing the deed? It is said, that they immediately took steps to repudiate liability. They do not appear, however, to have asserted that they were not bound by their execution of the deed, but merely to have objected that Mr. Cammell and Mr. Horncastle had not signed, and to have acceded to a proposal to transfer their shares, and in the case of one of them, a transfer having been sent to him, he actually executed it. The appellants, therefore, hardly stood upon the ground, that their signatures were of no account, because they had been drawn in by false representations. They appear rather to have treated themselves as owners, and endeavoured to transfer their shares to others. It has been held recently, that where persons have been led to

become partners to an undertaking by means of false and fraudulent representations contained in a prospectus, if they with knowledge of the fraud continue to be members, and act as members, they cannot afterwards come to a Court of Law, and claim to \* have back their deposit or calls, on the ground of \* 285 their not being members by reason of the fraud practised on them. Applying that principle to the present case, and independently of other considerations such as the subsequent signing of other shareholders, I have no doubt that the Master of the Rolls was perfectly right, and that the appellants ought to continue on the list.

The Lord Justices concurred.

Appeal dismissed with costs.

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#### POLE v. JOEL.

1858. March 29. Before the LORDS JUSTICES.

Upon a motion by way of appeal from an order granting an injunction, the respondent may adduce fresh evidence in support of the injunction.<sup>1</sup>

This was a motion by the defendant by way of appeal from an order of the Master of the Rolls, restraining him from the prosecution of certain proceedings at law at the Cape of Good Hope. This order was made on motion. After the notice of appeal motion had been given, the plaintiff filed a further affidavit.

*Mr. Rendall*, who appeared in support of the appeal, objected to the admission of the affidavit. He submitted that although a party appealing from the refusal of a motion might treat his appeal motion as a new motion and adduce fresh evidence upon it, this rule did not apply to a case like the present, and that the injunction could only be sustained upon the materials upon which it was granted.

<sup>1</sup> See 2 Dan. Ch. Pr. (4th Am. ed.) 1488, 1603.

THE LORD JUSTICE KNIGHT BRUCE.—The plaintiff is  
 \* 286 clearly entitled to adduce fresh \* evidence in support of  
 the order which he has obtained. The point is well settled,  
 and the affidavit is admissible.

The Lord Justice TURNER concurred.

*Mr. Speed* appeared for the plaintiff.

### ADKINS v. BLISS.

### VALE v. BLISS.

1858. March 30. Before the LORDS JUSTICES.

An order dated 19th November ordered A. to pay to B. a sum of money "on or before the 1st of December next, or within four days after service of this order." The order was not passed and entered till 2d December, and was never served on A. After a month from the time of entering the order, B. sued out a writ of *fieri facias* against the goods of A. for the amount: *Held*, that A. was not in default, and that the writ was irregular.<sup>1</sup>

The 1st General Order of 10th May, 1839, does not authorize the issuing a writ for money payable under an order which directs payment within a certain time after service, and has not been served.<sup>2</sup>

THIS was a motion by Jabez Adkins, the plaintiff in the first above-named suit, by way of appeal from an order of Vice-Chancellor STUART, refusing a motion to set aside certain writs of *fieri facias* as irregularly issued.

On 4th June, 1857, an order had been made in the two suits, directing among other things, that an account should be taken of what sums were due to the plaintiffs in *Vale v. Bliss* in respect of certain legacies, and that Adkins should pay the amount within a week after the date of the chief clerk's certificate. The certificate was made on 8th August, but was not served till several weeks afterwards; and Adkins not having made the required payments,

<sup>1</sup> See 2 Dan. Ch. Pr. (4th Am. ed.) 1043, 1044, 1063, 1064.

<sup>2</sup> See 2 Dan. Ch. Pr. (4th Am. ed.) 1793.

the Court, on 19th November, 1857, made on motion, a notice of which was duly served on Adkins, the following order:—

“That the said Jabez Adkins, the plaintiff in the first-mentioned suit, do, on or before the first day of December next, or within four days after service of this \*order, such service \* 287 to be verified by affidavit, pay to the plaintiff in the secondly mentioned cause, Samuel Vale, in right of his wife Sarah Vale, the sum of 110*l.* 12*s.* 6*d.* mentioned in the certificate of the chief clerk, dated 8th August, 1857, together with 1*l.* 2*s.* 8*d.* for subsequent interest on 100*l.*, part thereof, from the date of the said certificate to the said 1st day of December next, and do within the time aforesaid pay to the plaintiff in the secondly mentioned cause, J. S. Glover, the sum of 381*l.* 14*s.* 5*d.*, together with 3*l.* 8*s.* for subsequent interest on 300*l.*, part thereof, from the date of the said certificate to the said 1st day of December next.”

This order was not entered till the 2d of December, and was never served on Adkins. Payment not having been made for more than a month after the entry, the plaintiffs in *Vale v. Bliss* sued out writs of *fieri facias* against the goods of Adkins, and on 13th January, 1858, the sheriff levied on them the sums payable under the order, together with sheriff's poundage, fees, and other expenses incident to the levy. Adkins moved, before Vice-Chancellor STUART, that the writs of *fieri facias* might be set aside, and the moneys levied under them returned, and that Vale and Glover might be ordered to pay the costs. Vice-Chancellor STUART having refused the application Adkins appealed.

*Mr. Bacon* and *Mr. Roxburgh*, for the appeal motion.—The writs were clearly irregular. The order not having been entered till 2d December, the order for payment on or before 1st December was inoperative, and the event named in the other alternative of the order has never arrived. The only authority referred to against us is the note to Seton on Decrees. (a) “By General Order \* of 10th May, 1839, (b) the party prosecuting \* 288

(a) 2d ed. 648.

(b) The 1st order of 10th May, 1839, is as follows: “That every person to whom in any cause or matter pending in this Court any sum of money or any costs have been ordered to be paid, shall, after the lapse of one month from the

is entitled to sue out the writs of *fieri facias* or *elegit* after the lapse of one month from the time an order for non-payment of money or costs is passed and entered, but since by General Order 12 of 11th April, 1842, (a) every decree or order for payment of money should limit a time, or time after service, the record and writ clerks will in that case not issue the writs until the time (and, if the order has been served, the time after service) has expired; if, however, the order does not limit any time, or only limits a time after service, and has not been served, the record and writ clerks will issue the writs after the lapse of one month from the entry. *Ex rel.* Mr. Veal, late clerk of records and writs." If this be the practice of the office, it is irregular, for Adkins is in no default.

*Mr. Malins* and *Mr. Faber* contended that Adkins was in default, having had notice of the motion for the order, and having on a merely technical ground avoided payment under the order of June, 1857, and that the 1st General Order of 10th May, 1839, justified the practice of the office.

*Mr. De Gex* appeared for the sheriff.

\* 289     \*THE LORD JUSTICE KNIGHT BRUCE.—I think the General Order of 10th May, 1839, not open to the construction suggested by the respondent. The order dated 19th November, 1857, directed certain sums of money to be paid "on or before the 1st day of December next, or within four days after the service of this order." The order was not entered till 2d December, and so for every purpose material on the present occasion it was no order till that day. The first part of the order was therefore impossible, the time fixed by the second has never arrived, and I am of opinion that the writ of *fieri facias* was not authorized, but was irregular. If Mr. Adkins, on whose goods the levy was made, will consent that the principal sums shall be retained by the persons for whom

time when such order for payment was duly passed and entered, be entitled, by his clerk in Court, to sue out one or more writ or writs of *fieri facias* or writ or writs of *elegit*, of the form hereinafter stated, or as near thereto as the circumstances of the case may require."

(a) i.e., the 12th General Order of 26th August, 1841, as amended by the 6th General Order of 11th April, 1842.

they were levied, the interest, which nothing but the irregular *fieri facias* could have given them, being restored to him, and will undertake not to proceed by way of action, I think that he ought to have all his costs in this Court, but if he will not agree to those terms I am not for giving him any costs here.

THE LORD JUSTICE TURNER.—I agree. I am of opinion that the 1st General Order of 10th May, 1839, carries within it the necessity of the party being in default, and here Mr. Adkins was not in default.

*Mr. Bacon* having assented to the terms proposed, and also waived his right to the restoration of interest, their Lordships ordered that the expenses incident to the levy, which had been paid by Adkins, should be returned to him, and gave him the costs of the motion, both before the Vice-Chancellor and the Court of appeal.

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\* In the Matter of PEYTON'S SETTLEMENT      \* 290  
and  
In the Matter of the TRUSTEE ACT, 1850.

1858. March 30. Before the LORDS JUSTICES.

The 22d section of the Trustee Act, 1850, authorizes an order vesting the right to receive future dividends.

One of four trustees of a sum of stock being out of the jurisdiction, an order was made under the above section vesting the right to receive the dividends in the other three, but was, on appeal by the bank, varied by restricting it to the dividends to accrue due during the joint lives of the three.<sup>1</sup>

THIS case came before the Court on an objection taken by the Bank of England to an order of the Master of the Rolls, vesting the right to receive the dividends of a sum of stock in three out of the four trustees in whose names it was standing.

The sum in question was a sum of 956*l. 7s. 4d.* bank stock standing in the names of W. D. J. O'Reilly, G. R. Peyton, John

<sup>1</sup> See Lewin Trusts (5th Eng. ed.), 762.

Faris, and Alexander Smith, the trustees of a contract in Scotch form made on the marriage of Henry Alfred Peyton with Miss O'Reilly.

O'Reilly being out of the jurisdiction, the three other trustees and the husband presented a petition under the Trustee Act, 1850, upon which the Master of the Rolls made the following order: "That the right to receive the dividends now due or hereafter to accrue due on the 956*l. 7s. 4d.* bank stock, or any other sum of bank stock standing in the names of the petitioners the said G. R. Peyton, J. Faris, and Alexander Smith as three of the trustees of the said indenture jointly with the said W. D. J. O'Reilly out of the jurisdiction of this Court, do vest in the petitioners the said G. R. Peyton, J. Faris, and A. Smith alone."

Upon this order being communicated to the bank, the form of it was objected to, and the petition was again set down before \* 291 the Master of the Rolls for the bank to \* appear and be heard upon it. They accordingly appeared before his Honor, and objected that the 22d section of the Trustee Act did not authorize an order which, without disturbing the ownership of the *corpus* of the stock, transferred a perpetual right to receive the future dividends. His Honor, after argument, disallowed the objection, which was now renewed before the Lords Justices.

*Mr. Wiggram* and *Mr. Cotton*, in support of the objection, contended that the words "to receive the dividends thereof" in the 22d section of the Act, applied, if properly construed, only to dividends due at the date of the order, and severed from the stock: *In re Hartnall*; (a) and that at all events the words could not in their most extended sense be construed so as to apply to all future dividends, otherwise the stock might remain vested in one set of persons as holders, while the perpetual right to receive the dividends would become vested in some one else. They also urged that great inconvenience would arise to the public and to the bank from orders which to any extent severed the title to the dividends from the title to the stock, and that if the Act authorized such orders, they ought not to be made without a case of actual necessity, which did not exist here, for that there was no valid reason why the stock itself should not be vested in the three.

(a) 5 De G. & Sm. 111.

*Mr. Roundell Palmer* appeared for the petitioners.

Their Lordships varied the order by confining it to dividends to accrue due during the joint lives of G. R. Peyton, J. Faris, and A. Smith.

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\* COUNTESS OF MORNINGTON *v.* KEANE. \* 292

1858. March 11, 13, 20, 24, 27. Before the Lord Chancellor Lord CHELMSFORD and the LORDS JUSTICES.

A covenant that the covenantor would on or before a specified day either by a charge on freehold estates in England or Wales, or by an investment in the funds, or by the best means which might be then in his power, secure the payment of an annuity to a trustee for his wife: *Held*, not of itself sufficient to create a charge on the covenantor's property.<sup>1</sup>

*Roundell v. Breary*, 2 Vern. 482, explained and corrected.

*Quare*, whether *Wellesley v. Wellesley*, 17 Sim. 59, ought to be followed.

THIS was a cause heard by order originally before the full Court. The plaintiff was described in the title of the cause as the Countess of Mornington, the wife of the Right Honourable William Pole Tylney Long Earl of Mornington, suing without a next friend and *in forma pauperis*, under the authority of an order dated the 22d of January, 1855. The object of the suit was to enforce against the defendants a charge upon a freehold house in Saville Row, in which the defendants claimed to be interested, deriving their title from the Earl of Mornington, by whom the charge was alleged to have been created.

The charge was claimed under a covenant contained in a separation deed, dated the 21st of June, 1834, and made between the Earl of Mornington, then the Honourable William Pole Tylney Long Wellesley, of the first part, the plaintiff, his wife, then Helena Wellesley, of the second part, and Colonel Thomas Patterson, the plaintiff's father, of the third part. The deed recited that in consequence of differences which had arisen and subsisted

<sup>1</sup> See 1 Sugden V. & P. (8th Am. ed.) 711; 2 Dart V. & P. (4th Am. ed.) 862; 2 Story Eq. Jur. §§ 1281 *a*, 1249; *Pinch v. Anthony*, 8 Allen, 536; *Lewin Trusts* (5th Eng. ed.), 112, 113; *Perry Trusts*, § 122.

between the earl and the plaintiff, they had agreed to live separate and apart from each other ; and it was thereby witnessed, that for the purpose of making a provision for the plaintiff from and after the 14th of November, 1834, and during the then remainder of her life, and for the consideration therein mentioned, the earl, for himself, his heirs, executors, and administrators, thereby covenanted and agreed with Colonel Paterson, his executors, and

\* 293 administrators, that the earl would \* on or before the 1st day of February , 1835, well and effectually, either by a charge on freehold estates of inheritance, to be situate in England or Wales, or by an investment of an adequate sum of money in some of the stocks or funds of Great Britain, or by the best means which might then be in his power, secure the payment to Colonel Paterson, his executors, or administrators, during the life of the plaintiff, of an annuity of 1000*l.*, in equal quarterly portions, on the 14th of February, the 14th of May, the 14th of August, and the 14th of November, in every year, the first quarterly payment of the annuity to be made on the 14th of November, 1834, and it was thereby agreed that Colonel Paterson, his executors, or administrators, should stand possessed of or interested in the annuity in trust for the plaintiff for her sole and separate use and benefit, but not to be subject to any sale, charge, mortgage, or other disposition, by the plaintiff by way of anticipation ; and it was thereby further agreed, that, upon the annuity of 1000*l.* being so secured as aforesaid, such deeds should be executed by all necessary parties for carrying into effect the now stating agreement and the intention of the parties therein expressed, with such covenants and agreements on the part of the earl for permitting the plaintiff to live separate and apart from him as if she were a *feme sole* and unmarried, and with such covenants on the part of Colonel Paterson, or, in case of his death in the mean time, of some other responsible person, for indemnifying the earl against all debts contracted by the plaintiff after the annuity should have been so secured as therein mentioned, and during the then remainder of her life, and from all costs, claims, and demands which the said earl should or might sustain or incur or become subject or liable to on account of the maintenance, support, lodging, and wearing apparel of the plaintiff, or otherwise on her account, from \* 294 and after the day of the date thereof and \* during the then remainder of her life, and with such other usual covenants

and provisions as the respective counsel of them the said earl and the plaintiff should advise and require.

The plaintiff had already sought to enforce the covenant contained in the separation deed against certain interests which the earl took under deeds of settlement of the 12th, 14th, and 15th of December, 1834, and had for that purpose instituted a suit, in which she obtained a decree. The case is reported at various stages of it under the name of *Wellesley v. Wellesley*, in 10 Simons, 256; 4 Mylne & Craig, 554, 561; 17 Simons, 59; 1 De Gex, Mac. & Gor. 501.

She now alleged, by her present bill, that she had been unable to obtain any benefit from the decree obtained in the former suit, and that the estates and interests of the earl under the deeds of the 12th, 14th, and 15th of December, 1834, were subject to divers charges and incumbrances of very considerable amount, in consequence whereof the plaintiff had hitherto been unable to recover any part of her annuity of 1000*l.* or of the arrears; and that, in fact, no moneys whatever had been paid to or received by her in discharge of the annuity or the arrears.

The bill then stated a will and certain deeds, whereby the house in Saville Row, which was the subject of the present suit, became vested in the earl in fee, subject to a life-interest in his mother; and stated that the defendant Daniel Keane claimed under two deeds, by one of which the earl mortgaged the house to him, and by the other of which he conveyed to him the equity of redemption. It also stated that the other defendants claimed under mortgages and other securities made by \* the defendant Daniel Keane, and it charged that at the time of the execution of each of these deeds, and of the payment of the consideration (if any) for them, the defendant Daniel Keane had notice of the separation deed, and that the other defendants had also notice of it by employing him as their solicitor. The bill also sought to impeach the deeds on various grounds not material to be stated, the decision having turned on the effect of the separation deed.

The bill also alleged that the plaintiff had only lately discovered the fact that the defendant the Earl of Mornington had on the 1st day of February, 1835, any estate or interest in the house and premises in Saville Row (an allegation, however, which was contradicted by the evidence, the plaintiff, on her cross-examina-

tion, having admitted that she had been from the beginning aware of the earl's title to the Saville Row house).

The prayer was, that it might be declared that by force and virtue of the separation deed a charge was created in favour of the plaintiff for her annuity of 1000*l.*, as on and from the first of February, 1835, upon the messuage and hereditaments in Saville Row, and upon all the estate and interest therein of the defendant the Earl of Mornington, in priority to any charge, incumbrance, estate or interest therein which had been created in favour of or was vested in the defendants or any or either of them, and that the premises might be sold and the proceeds of such sale applied in payment of the amount due to the plaintiff in respect of her annuity of 1000*l.* and the arrears thereof. It also sought, in the alternative, other relief not material to be stated.

The defendants denied the allegations on which the deeds \* 296 were sought to be impeached, and evidence was \* gone into on both sides, but the grounds on which the decision of the Court proceeded render it unnecessary further to state the effect of the evidence.

Before the cause came on to be heard the Earl of Mornington, who was a defendant, died, and the suit was revived against his executors.

*Mr. Rolt* and *Mr. Freeling*, for the plaintiff.—First, the covenant in the articles of separation is of such a nature as to create a charge on all the lands which the covenantor had at the time at or before which the charge was to be created, equity considering done that which ought to be done, and a covenant to charge at or before a particular time being in equity, as regards all who have notice of it, equivalent to an actual charge. Thus, in *Roundell v. Breary*, (a) a father covenanted on his son's marriage to settle in one month after the marriage lands of the value of 150*l.* per annum, and died without having made any settlement, and a bill was filed against the heir to have lands settled. The heir had on his own marriage settled a portion of the descended lands, and his wife claimed a jointure as a purchaser without notice. In that case the lord keeper was of opinion that although no lands were mentioned in the articles, yet the covenant should be a lien upon the land

(a) 2 Vern. 482.

whereof Henry Breary was then seised, unless he had purchased and settled other lands within the time limited by the articles, and which were not settled on the second wife, who came in as a purchaser without notice. This case has never been impugned, but has been acted on ever since. So, in *Ravenshaw v. Hollier*, (a) a father covenanted to pay an annuity to his daughter out of the rents and income of his real and personal estate, and it was

\* held that the covenant created a charge on the estate as \* 297 against a mortgagee with notice. And in *Watson v. Sadlier* (b) it was held, that a grant of an annuity or yearly rent-charge, not naming any lands, but covenanting that in case of an arrear the arrear shall be recoverable of, from, and against the estate, real and personal of the grantor, coupled with a letter written pending the treaty by grantor to grantees specifying certain lands, constituted a specific lien on the lands so named; and that if by means of any undisclosed incumbrance the annuitant was shut out of those specified lands the Court would lay its hands on any other lands, the property of the grantor. So in *Lyde v. Mynn*, (c) the defendant *Mynn* covenanted to charge an annuity on all such property as he should, in the event of his wife's decease, become entitled to by virtue of his will or otherwise, and the land was held to be charged. In *Metcalfe v. Archbishop of York*, (d) an incumbent covenanted that if he were preferred to any other benefice he would charge it with a specified amount, Lord COTTFENHAM decided that the benefice, when acquired, was subject to the charge. But the point now before the Court was decided upon the construction of this very covenant by Lord COTTFENHAM in *Wellesley v. Wellesley*, (e) where his Lordship said: "The contract is not to purchase lands for the purpose of the agreement, but one alternative is to charge lands in February, 1835, and at that time he had a power of charging lands. It is the same as a contract to charge such lands as he might have at that time, and if so such was *Metcalfe v. The Archbishop of York*, (g) and *Lyde v. Mynn*, (h) and such was *Tooke v. Hastings*, as reported in 2 Vernon, \* 97. In \* 298 *Lewis v. Maddocks*, (i) a contract upon marriage to settle all personal estate of which the husband might become possessed

(a) 7 Sim. 3.

(e) 4 Myl. & Cr. 579.

(b) 1 Moll. 585.

(g) 1 Myl. & Cr. 547; 6 Sim. 224.

(c) 1 Myl. & K. 683.

(h) 1 Myl. & K. 683; 4 Sim. 505.

(d) 1 Myl. & Cr. 547.

(i) 17 Ves. 48.

during the coverture was enforced against an estate he had purchased in part with personal property so acquired. Being, therefore, of opinion that the contract, as stated in the bill, must upon the case stated be enforced against Mr. Wellesley, and that to effect that object the Court will act upon the estates which he had a power of charging in February, 1835, and of which the defendants are trustees for him, I think that this demurrer must be overruled. My opinion being founded upon the construction I put upon these articles of separation, that they amount to a contract to charge the annuity upon such lands as the husband had power to charge in February, 1835, and that the defendants are trustees of the property which he had at that time power so to charge, and that this Court will therefore by its decree, if necessary, secure to the plaintiff the annuity contended for out of the property so vested in the defendants, I do not think it necessary to discuss the ground upon which I am informed the Vice-Chancellor overruled this demurrer, or the doctrine of the case of *Fremoult v. Dedire*, (a) where the contest was with the covenantor's creditors upon a general covenant to settle lands of a certain value, which was not enforced during the lifetime of the covenantor, except to observe that that case does not appear to be so much at variance with that of *Roundell v. Breary* (b) as seems to have been supposed, because in the latter case the covenant was on a certain day to settle lands of a certain value, and the lord keeper thought it created a lien upon the land of which the covenantor was then seised, and in that respect *Roundell v. Breary* much more resembles \* 299 the present; and that \* case is relied upon by Lord HARDWICKE in *Deacon v. Smith*. (c) The same point was decided at the hearing, (d) and the Lords Justices, on appeal, confirmed the decision. (e) It must on these authorities be taken as established that this covenant creates a charge, if the defendants had notice of it; and the evidence shows that the principal defendant had actual notice of it at the date of the mortgage, and that the other defendants had at least constructive notice. The plaintiff is therefore entitled to the decree sought by her bill.

[The Lord Justice KNIGHT BRUCE said that he had no recollection]

(a) 1 P. Wms. 429.

(d) 17 Sim. 59.

(b) 2 Vern. 482.

(e) 1 De G., M. & G. 501.

(c) 3 Atk. 323

tion of the question as to the covenant creating a general lien having come before the Lords Justices on the appeal which had been referred to.]

*The Solicitor-General*, for the defendant Daniel Keane. — The case divides itself into two parts: First. The title of the plaintiff to maintain a suit like this. Second. The title of the defendant Daniel Keane as against the plaintiff and Lord Mornington to retain the property of which he took a legal conveyance. The argument on the other side has been addressed mainly to the second of these points, adopting the common strategy of passing over into the enemy's country and attacking his position, taking for granted the strength of your own. I will, however, submit to the Court four propositions, each of which I shall prove, and any one of which, if established, must be fatal to the plaintiff's case. 1st. The covenant did not create any lien on the property. 2d. It was the duty of the plaintiff, if it did, to have asserted her title promptly, instead of lying by for twenty years all \* but six days. 3d. That the plaintiff having, in the month \* 300 of May, 1839, instituted the suit of *Wellesley v. Wellesley*, which was a suit for the specific performance of this same covenant, made her election to enforce her charge against the estates resettled by the deeds of 1834, it not being competent to a plaintiff to seek specific performance piecemeal; and she having thus made her election, and on the footing of it obtained a decree, knowing at the time the title of the earl to the Saville Row house, the consequence is, that she discharged and relinquished any claim against that property. 4th. That the Saville Row house having been aliened was only secondarily liable, and that the plaintiff has released it by an agreement as to jointure.

[The Lord Justice KNIGHT BRUCE having sent for the decree affirmed by the Lords Justices in *Mornington v. Wellesley*, (a) said that the point as to the covenant creating or not creating a general charge did not appear to have been touched by their Lordships' decision.]

With respect to that case, I will only observe, that no one of the decisions in it is any authority for the proposition, that the cove-

(a) 1 De G., M. & G. 501.

nant would of itself bind all or indeed any part of the property of the covenantor. But I may go further, and say, that the necessity which the plaintiff there found herself under of resting the case on the new allegation introduced into the bill by amendment was pregnant with the admission, that the general covenant would not have been sufficient to bind the property without more. If the plaintiff's present contention can be supported, not only was the property there in question bound, but all the covenantor's other

\* 301 property, in short, every thing that he had in the world, so that as soon as the 1st of \*February, 1835, arrived, the plaintiff might have had a receiver appointed of her husband's entire property of every description until he performed the covenant. And it would follow, that the very property which was resettled was bound, so that the resettlement would not have prevailed against the plaintiff, but would have been subject to the covenant contained in the separation deed, and would have been charged with the annuity, a view which seems not to have occurred to those who then supported her case. Consequences so absurd as these are not to be disregarded in construing the language of a covenant.

The authorities cited in support of the argument on behalf of the plaintiff are entirely distinguishable. In *Roundell v. Breary*, (a) the question was between the covenantee and the heir of the covenantor. The covenant bound the heir to the extent of the descended estates of the covenantor; and to avoid circuity, the Court would, in such a case, charge upon the land the annuity itself. The case might have been an authority for the present plaintiff if the defendant there had been an alienee from the covenantor, or even if the covenantor had been alive and had been himself the defendant, but it would then have been in conflict with many authorities to which I shall presently advert. As it was, it depended on different principles from the present case and cannot affect it. In *Ravenshaw v. Hollier*, (b) the words of the covenant were materially different from those now to be construed, for there was a present covenant to pay out of specified property, and though that property was the whole property of the covenantor, it was not the less specific on that account. In *Watson v. Sadlier*, (c) all that the plaintiff relies upon is a mere *obiter dictum*.

(a) 2 Vern. 482.

(b) 7 Sim. 3.

(c) 1 Moll. 585.

*tum* \* ascribed to Sir A. HART, for the decision (so far \* 302 as there was any) was against the annuity creditor. The real question in that case was as to the priority of the annuitant over a grantee *in custodiam*. There was in the annuity deed a covenant that the arrears should be recoverable of, from, and against the estate real and personal of the grantor. But there was also a letter written pending the treaty for the annuity which specified certain lands as those intended to be charged. The Master of the Rolls had, against his own opinion, and on the authority of an order of Lord MANNERS, granted a receiver of the rents and profits of the specified lands as against the grantee *in custodiam*. Sir A. HART thought that the Court of Chancery ought not so to interfere with the order of the Court of Exchequer, but reserved his final decision to look into the authorities, and the case was not again mentioned. All that the plaintiff relies upon in the report is a sentence in the judgment, where Sir A. HART is reported to have said: "I agree in the view of the Master of the Rolls, that the letter reduces the general covenant to a specific lien; and I am further of opinion, that if by means of an undisclosed incumbrance the annuitant was ousted out of those specified lands, the Court would lay its hands on any other land of the grantor." From what has been said, it appears that this, at the utmost, was a mere *obiter dictum*, but the defendants are not concerned to dispute its accuracy, for in *Watson v. Sadlier*, (a) the words were words of express present charge, and not at all resembling those of the covenant in the present case. In *Lyde v. Mynn*, (b) the property intended to be charged was distinctly specified, and the same observation applies to *Metcalf v. The Archbishop of York*, (c) and to *Lewis v. Madocks*. (d)

\* None of the cases therefore cited on the other side \* 303 affect the present in the plaintiff's favour. On the other hand, there are a series of authorities involving decisions on principles altogether at variance with her contention. Thus in *Free-moult v. Dedire*, (e) Abraham Dedire, on his marriage, covenanted to settle his lands in Romney Marsh, and also lands of the value of 60*l.* per annum, and the Lord Chancellor, in giving judgment, said: "The covenant for settling lands of the value of 60*l.* per-

(a) 1 Moll. 535.

(d) 17 Ves. 48.

(b) 1 Myl. &amp; K. 683.

(e) 1 P. Wms. 429.

(c) 1 Myl. &amp; Cr. 547.

. annum on the wife for her life does not specifically bind any lands, wherefore as touching that the wife must come in only as a specialty creditor." So in *Lewis v. Hill*, (a) Sir R. Hill, on his marriage, covenanted that he, his executors, or administrators, would purchase an estate of 600*l.* per annum to be settled, and Lord HARDWICKE said: "Nor can it be said there was a specific lien by the articles. It was so held in *Deacon v. Smith*, and that the intention was the rule." In *Williams v. Lucas*, (b) a testator promised to give a security on lands for 300*l.* when required, and it was held that the case was not distinguishable from *Freemoult v. Dedire*, but that as the creditor had taken a personal security payable on demand, reserving to himself power to call for real security, which he had not done, it was impossible to hold a charge to have been created. A still more important case was *Deacon v. Smith*, (c) where a father had, by marriage articles, covenanted that he would convey and settle houses, lands, and hereditaments, or a rent-charge thereon for 40*l.* The Master of the Rolls held so much of the estate purchased as was in possession at the time of purchasing ought to be considered as purchased in part performance of the covenant, and that the other half not being in

\* 304 possession was not purchased in pursuance \* of the articles,

but descended to the heir. On the appeal Lord HARDWICKE said, that the question was one of intention, and that if there was a sufficient presumption that it was the intention of the settlor that the land should go according to the articles it was bound by them, but that if the husband had sold or mortgaged the lands, that would be evidence of a different intention. And Lord HARDWICKE, then citing *Roundell v. Breary*, says that the intention of the husband ought to prevail if it appeared that he intended that the estate should be bound by the articles. In *Gardner v. Townshend*, (d) there was a covenant that the covenantor would well and sufficiently convey and assure, or procure to be conveyed and assured, freehold manors, messuages, lands, tenements, or other hereditaments of the clear yearly value of 4000*l.* It appeared that he was, at the date of the settlement, entitled in equity to lands of the value of 5000*l.* per annum. Sir W. GRANT there held, that although a person who purchased lands having entered into a prior covenant to convey might be presumed to do so in discharge,

(a) 1 Ves. 274.

(c) 8 Atk. 323.

(b) 2 Cox, 160.

(d) Coop. 301.

such an intention could not be presumed as to lands to which he was entitled at the time. The authorities, therefore, as well as the reason of the case, are with the defendants, upon the parts of the propositions for which I contend.

He then argued, in support of the three other propositions, which he had begun by stating, but as the Court gave no decision or opinion on them, it is considered better to confine the report of the arguments to the first point.

March 24.

The Lord Justice TURNER having sent for the registrar's minute-book containing the entries of *Roundell \* v. Breary*, \* 305 read them, together with extracts from the evidence in that case as set out at the end of this report.

*Mr. De Gex* (who followed the Solicitor-General on the same side) was desired by the Court to confine his argument to the point as to the effect of the covenant, their Lordships considering it convenient to have that point argued separately. He contended that *Roundell v. Breary*, (a) as now explained by the entries in the registrar's book, was quite in accordance with the other authorities, and by no means bore out the proposition that a mere covenant to create a charge at a future time would of itself operate as a charge. The case appeared to have been one of those in which particular lands had been designated, and where there had been steps taken towards a performance of the covenant, and moreover, to have been compromised, so that there had really been no decision at all in it. With regard to the covenant in the present case, the whole question was one of construction, whether the intention of the parties to the deed was that a charge should be created without more being done. With respect to this Lord St. LEONARDS thus states the law: "It may be considered as a general rule, although it may not hold universally true, that a covenant to convey and settle lands will not be a specific lien on the lands of the covenantor, but the covenantee will be a creditor by specialty." (b) Now, in the first place, the words of the covenant now before the Court, apart from any controlling context, imported no such thing as a charge; they imported nothing beyond

(a) 2 Vern. 482.

(b) Sugd. V. & P. p. 922, 11th ed.

a personal engagement to do a particular act at or before a particular day. And so far was the context from controlling this natural import of the express words, that every other part

\* 306 of the instrument was consistent \*with that import and at variance with the interpretation sought to be put on the words by the plaintiff. For example, the agreement for the indemnity of the earl against his wife's debts, which constituted the consideration for the deed, was only that upon the annuity being secured by the earl such deeds should be executed by all necessary parties, with (among other specified stipulations) such covenants on the part of Colonel Paterson, or, in case of his death in the mean time, of some other responsible person, for indemnifying the earl against all debts contracted by the plaintiff after her annuity should have been so secured as therein mentioned. So that if the plaintiff's construction of the covenant could be supported, the earl's lands would have been *ipso facto* charged on the first of February, and yet he would not have the indemnity which constituted the consideration for the charge. Again, the words of the covenant were, lands "to be" situate in England or Wales, thereby pointing, not to present, but to after-acquired lands. The literal construction of the words and the context were alike adverse to the plaintiff's contention, and so was every inference to be drawn from the surrounding circumstances, for the evidence adduced in *Wellesley v. Wellesley*, and on which the plaintiff obtained her decree in that suit, proved that what the parties had in view was the resettlement of December, 1834, and that the object of the articles was not to create an immediate charge on any land, but to create a personal obligation to exercise the powers intended to be contained in the intended deeds of resettlement (which were then in the course of preparation), for the purpose of effectuating the provision agreed to be made by the separation deed. It was, however, contended on the other side, that, notwithstanding the express words of the covenant, notwithstanding the equally clear

context, and notwithstanding the irresistible inference from \* 307 surrounding \*circumstances in aid of this construction (if any such aid could be needed), there were authorities which must be contravened, if the Court came to the only conclusion at which it could arrive consistently with the reason of the case. When, however, the authorities came to be cited, the only one which had the semblance of being in point was that of *Roun-*

*dell v. Breary*, the whole weight of which was destroyed by the explanation now given from the pleadings and evidence and entries in the minute-book. No one of the other cases cited was at all like the present. In none were the language and context of the same kind. In none was there an option between a charge on land and money in the funds. The distinctions between the cases cited on behalf of the plaintiff and the present had already been clearly pointed out by the Solicitor-General, who had also brought to the attention of the Court cases directly supporting the construction for which the defendants contended. In addition to these cases there might be adduced, without any detailed reference to them, the whole line of authorities on the question of what amounted to a sufficient indication of intention on the part of a covenantor, who has entered into a covenant of this description, to perform it, for the purpose of charging a particular estate; for the very existence of such authorities was conclusive in favour of the defendants. How could it be material to consider what a covenantor's intention was if the covenant bound the land *ipso facto*? It was said that these were all cases of indefinite covenants, but there was no authority for the distinction attempted to be set up between such covenants and covenants to settle on or before a particular day. The only difference was, that in the former case the limit was the death of the covenantor. He had his whole life to perform the covenant, but at his death the time for performance had elapsed; and if the doctrine contended for were correct, the lien \* or charge ought to have been held to attach \* 308 at the moment of his death on all the lands of which he was then seised, independently of any expression or manifestation of intention on his part to execute the covenant.

*Mr. Willcock*, for the incumbrancers.

*Mr. Druce*, for the executors of the Earl of Mornington.

March 27.

*Mr. Rolt*, in reply.—Although there may not have been an actual decision in *Roundell v. Breary* to the effect for which we contend, by reason of the compromise which took place, the reporter, who was one of the counsel in the case, distinctly states the opinion which no doubt led to the compromise, and which

therefore must be regarded as of the same weight as an actual decision.

[The Lord Justice TURNER observed that the cases at the end of Vernon were published after his death, and were not always very accurate.]

What, however, is of more importance is, that the case has always been understood and acted upon, both in Court and by conveyancers out of Court, as laying down the law in the manner stated in the report. It is, therefore, really of greater authority than a mere decision of itself would be, and is of too long standing to be now overruled. The cases referred to as at variance with it are not at all so. They are all cases of mere general covenants, where no time is fixed at or before which the charge is to arise. In such cases, unless the covenantor does something for the purpose of executing the covenant, there is no time at which the charge can be considered as having been stipulated to take effect, and therefore no period at which equity can say that it ought to have been created and consequently has been created. Where a \* 309 time is limited the \* case is different, and a Court of Equity has then the means of saying when the covenant ought to have been performed. This distinction reconciles all the authorities, and leaves *Roundell v. Breary* and *Wellesley v. Wellesley* conclusive upon the point which is involved in this case, and which is wholly unaffected by the cases of mere general covenants referred to on behalf of the defendants.

He also, in addition to the cases cited in the opening, referred to *Randall v. Willis*, (a) *Coventry v. Coventry*, (b) *Alford v. Alford*, (c) *Shannon v. Bradstreet*, (d) *Jackson v. Jackson*. (e)

THE LORD CHANCELLOR.—The bill in this suit was filed by the Countess of Mornington against Daniel Keane and other defendants, praying, among other things, that it might be declared: [His Lordship read the part of the prayer set out, *ante*, p. 295.]

Various questions have been discussed in the course of the

- (a) 5 Ves. 262.
- (b) 2 P. Wms. 222.
- (c) Gilb. Eq. 167.

- (d) 1 Sch. & Lef. 52.
- (e) 4 Bro. C. C. 462.

argument, but the only one on which the Court finds it necessary to express an opinion is, that as to the effect of the articles of separation of the 21st of June, 1834.

According to the case made by the bill, the Earl of Mornington was at the date of these articles entitled to one moiety of a house in Saville Row, and was entitled to the other moiety in remainder expectant upon the death of his mother. On the 12th and 13th days \* of December, 1834, certain deeds were exe- \* 310 cuted. [His Lordship stated the effect of the deeds of resettlement, for which see the report of *Wellesley v. Wellesley*, 10 Sim. 256 ; 4 Myl. & Cr. 554.]

The earl having failed to perform the agreement of the 21st of June, 1834, the countess filed a bill against him and the trustees of the resettlement deeds of December, 1834, for a specific performance of the covenant in the separation deed. To this bill the trustees demurred for want of equity. The demurrer came on to be argued before the Vice-Chancellor of England, and is reported in the 10th volume of Mr. Simon's Reports. (a) It appears from the report that the Vice-Chancellor expressed no opinion as to the effect of the covenant in creating a lien on all the lands of the earl, but held that the articles of separation and the deeds of resettlement of December, 1834, were parts of one transaction, and that as the articles and the deeds corresponded with one another, so that the deeds of resettlement gave powers to the earl which would enable him to perform the covenant contained in the articles of separation, he was bound to perform it. His Honor therefore held, that, having regard to the frame of the deeds, there was an equity to have the covenant performed in such manner as it could be by means of the provisions of the deed of resettlement. His Honor overruled the demurrer for want of equity, but he allowed it for want of parties. The bill was then amended, and into the amended bill there was introduced a charge that the arrangement effectuated by the indentures of the 13th and 15th of December, 1834, was entered into by Mr. Wellesley for the purpose of providing for him the means of securing the annuity of 1000*l.* for the plaintiff, and in part performance of the agreement of the 21st of June, 1834.

\* The amended bill was also demurred to, and by the \* 311

demurrer of course the allegations and charges in the bill, including that introduced by amendment, were, for the purpose of the argument, admitted to be true. On the case coming before Lord COTTENHAM, he refers especially to the charge thus introduced by amendment, for his Lordship says : "Therefore there is a covenant to charge lands on a certain day; the purchase of lands before that day for that purpose, and in part performance, and a promise after the lands acquired to effect the charge, and a refusal to do so, and acts tending to defeat the security so acquired and promised to be charged." It has been said, that Lord COTTENHAM decided in that case the question as to the covenant creating a general charge on all the lands of Lord Mornington. It appears to me, however, that in the issues then before the Court this question was not raised. The demurrer was that of the trustees of the deed of December, 1834, for want of equity, and the case, as stated by the bill, was, that the property was after-acquired property, which ought to be held to be bound by the agreement by reason of the purpose for which it was acquired. From the report of the case at the hearing, it appears that this case so stated upon the bill was considered to have been made out, and was the ground on which ultimately the decree was made; for the Vice-Chancellor there said (*a*) (referring to the ground of his own decision upon the demurrer) : "It seems to me that the rule which was laid down, first of all by myself, and afterwards by the Lord Chancellor in the case of *Wellesley v. Wellesley*, governs the whole case." It appears to me, therefore, that the plaintiff can derive no aid from that case in support of her proposition as to a general charge having been created by the covenant.

\* 812 \* She now represents that she has obtained no benefit from the decree in that suit, and she alleges by her bill that she only shortly before it was filed discovered that the earl was entitled to the property which it is the object of this suit to charge. The fact, however, appears to be clearly otherwise, for on her cross-examination she says: "I knew of the Saville house property in 1834, and the reversion which Lord Mornington had in it. I knew it from Mr. Pyne, from Lord Mornington, and others of the family. I did not know of a registry office. I repeatedly mentioned the Saville house property to Messrs. Gadsden and Flower;

(*a*) 17 Sim. 62.

they were my solicitors from 1847 to 1853. I came over from France in 1846 and filed my bill in 1847. After the decree I mentioned to them the Saville Row house." The first question, however, is, did the covenant create any such charge? The decision upon this question may render the fact of notice immaterial.

Now, the covenant itself is apparently of a personal nature, not purporting to create any charge *ipso facto*, but providing for an act to be done, whereupon the charge is to arise. The words are "shall well and effectually, either by a charge on freehold estates of inheritance to be situate in England or Wales, or by an investment of an adequate sum of money in some of the stocks or funds of Great Britain, or by the best means which may then be in his power, secure the payment to the said Thomas Paterson, his executors or administrators, during the life of the said Helene Wellesley, of an annuity of 1000*l.* of lawful money of Great Britain, in equal quarterly portions." I agree that the words "to be situate in England or Wales" do not necessarily point to any property to be afterwards acquired to the exclusion of other property, and that they merely point to the species of property over which the charge is to be \* created; and I do not \* 313 doubt that the covenant would entitle the covenantee to have it performed *in specie*, or to recover damages for its non-performance, or that equity would lay hold of any property acquired with the view of performing the covenant for the purpose of satisfying it. But this is a different thing from putting a stop on all the covenantor's property and preventing him from dealing with any part of it.

It is however argued, that there is a distinction pervading the authorities between cases in which a time is fixed for the performance of the contract and cases in which the covenant is general and indefinite; and that, although in the latter case no charge exists, in the former it does. Now I cannot find any such distinction in the cases, and I should doubt the reasonableness of it; for I cannot see why, if a definite time be fixed, a charge should be immediately created, whereas if the time be the whole of the covenantor's life, so as to expire at his death, no charge should be created, or why the death in the latter case should not be equivalent to the fixed time in the former. I can well, however, understand a distinction between cases where a certain charge is created, and those where there is only a covenant to do an act whereby a charge will be

created. Nor do I doubt that a covenant that particular lands shall be charged may of itself create a charge upon those lands, or (which is the same thing) that a covenant that all the lands which the covenantor shall have on a particular day shall stand charged will create a charge without more.<sup>1</sup> But it is not the same thing when the covenant is to do an act on a future day which will create a charge on some unspecified property. I do not of course dispute that an agreement may be so framed as to operate of itself as a charge on the day, but then there must be apt words for \* 314 that purpose; and I cannot satisfy my mind that there \* are any words here to create a charge, or to do more than express a present covenant to create the charge on or before the appointed day.

A variety of cases have been cited which it was contended were in favour of construing this covenant as a general charge. But none has been cited going to the extent to which the argument is pressed. When we get rid of the distinction, which I cannot find to exist in any authority between a covenant to create a charge on a particular day and those cases in which the covenant is indefinite, all the authorities point in an entirely different direction. *Deacon v. Smith* seems to me a strong authority against the view pressed on the Court by the plaintiff. That was a case of a general covenant to convey and settle houses, lands, and tenements, or a rent-charge issuing out of the same. If such a covenant would (as is contended by the plaintiff) of itself create a charge on all lands of which the covenantor either was or afterwards before the expiration of the time for the performance of the covenant might be in possession, it would have been useless and irrelevant for the Court to have gone further into the case, or to have considered the intention with which the covenantor acquired lands afterwards purchased. But Lord HARDWICKE evidently considered the covenant not to have so extensive an effect, for he says: "In all these cases the Court have gone upon the intention of parties, and have not required that strictness as in the Statute of Frauds and Perjuries; and many cases have gone so far as to rely upon a strong presumption merely without any positive evidence." I think, therefore, that this case strongly expresses the opinion of Lord HARDWICKE, that a covenant of this kind creates no general charge.

<sup>1</sup> See *Pinch v. Anthony*, 8 Allen, 539.

The other cases which were referred to seem to me \* not \* 315 to bear out the proposition in support of which they were cited, with the exception of *Roundell v. Breary*. For, with that exception, they were generally cases where specific lands were pointed to as in *Metcalfe v. Archbishop of Canterbury* and *Watson v. Sadlier*. So in *Lyde v. Mynn*, where an annuity was to be charged on such property as the covenantor might have at a particular time, which is clearly specific property. The observations in *Freemoult v. Dedire* render that case, as it appears to me an important authority, as exhibiting the distinction between a covenant to charge specific lands and one to charge lands generally. There the testator had covenanted to settle his lands in Romney Marsh, and also lands that should be of the value of 60*l.* per annum upon his wife for her life; and it was held that the former part of the covenant created a charge and that the latter did not.

Therefore of all the authorities cited in the discussion of this case, there was only one, viz., *Roundell v. Breary*, which has created any difficulty in my mind. The language ascribed to the lord keeper in that case is no doubt very strong. The lord keeper is reported to have been of opinion, that, although no lands were mentioned in the articles, yet the covenant should be a lien upon the land whereof Henry Breary was then seised, unless he had purchased and settled other lands within the time limited by the articles, and which were not settled on the second wife, who came in as a purchaser without notice. There appears, however, to me strong grounds for thinking, on a careful examination of the registrar's book, that the report is not accurate. There seems reason for thinking that the covenantor had taken steps to reduce the general covenant to a specific one. Moreover, this case has not the authority of a decision, owing to the circumstance that there was no decree except \* one by consent. I am not \* 316 prepared to say, that in the absence of any other authority, even if there had been no explanation of this case, I should have felt myself bound by it. To a plain and ordinary understanding a covenant of this kind imports nothing beyond binding the covenantor to create a charge on some property; and it is giving a startling effect to it to say, that every part of the covenantor's property is to be so bound that he cannot deal with it except subject to the charge. No doubt a covenantor may so fetter his

estate if he think fit, but I do not think that such is the effect of a covenant merely framed as this is.

The bill must be dismissed.

**THE LORD JUSTICE KNIGHT BRUCE.** — I am also of opinion, that, according to the true construction of the agreement of the 21st of June, 1834, although it fixes a time which Lord Mornington survived, it did not create a charge or lien on any part of his property ; and, speaking with the utmost deference, I do not feel sure that the decree of the 21st of July, 1849, was wholly right, nor that the error (if any) committed by the Lords Justices in dismissing the appeal from that decree ought to bind us or be followed. I say if there was any error, because I am not satisfied that there was any. The only appellant there was the present earl, who may or may not have been a proper party to the suit. [His Lordship referred to the terms of the petition of appeal of Viscount Wellesley.] My recollection of what passed at the hearing of that appeal is slight or none, but the grounds of complaint thus expressed by the present earl may have been thought insufficient by reason of his father having been bound

to exercise his power of jointuring in favour of the present  
 \* 317 \* plaintiff, and of it not being competent to the present  
 earl, however his estate might be or have been affected by  
 the exercise of that power, to complain of it. Nor unless I am  
 mistaken, did the present earl, by his appeal, seek to be alto-  
 gether dismissed.

It appears to me, that as against all the defendants, except the defendants *Richardson* and *Temple*, (a) the present bill must be dismissed.

**THE LORD JUSTICE TURNER.** — I am of the same opinion. Cases like the present resolve themselves into this question,— Is there, or not, an agreement to charge the property against which the claim is sought to be enforced either by the terms of the covenant or by virtue of any act in performance or satisfaction of the covenant? The question whether there is an agreement by the terms of the covenant depends on the language of the deed ; and in considering that question, it has always appeared to me of great

(a) The executors of the late earl.

importance to see whether the deed is to have immediate operation, or whether the covenant is to have operation by any future act to be done by the covenantor, for if the latter be the case, all turns on the question in what mode the future act is to be done, and how the property is to be affected by the future act. Now the terms of this covenant are as indefinite as can be conceived. It is that : [His Lordship read it.]

The case of *Wellesley v. Wellesley* proceeded on the ground that there was an intention to perform or satisfy the covenant by the transaction there in question. Whether \* there \* 318 was or not in that case sufficient evidence of such an intention is not the question here. We are called upon to decide as to the property now sought to be charged, and to say, that on the 1st of February, 1835, there attached a lien on this property. It would require strong language to establish any such proposition ; and I have searched all the authorities cited and a great number of others, to see whether we are bound to put on this covenant the construction contended for by the plaintiff.

I can find no authority for that proposition. I believe that there is no case in which a lien has been held to be created by a covenant to charge property not defined by the covenant, and where there has been no acquisition of property with intent to perform the covenant. All the cases range themselves within one of these two classes : 1st. Where the covenant refers to particular property ; 2d. Where property has been acquired with an intention to perform or satisfy the covenant.

In saying that there is no such case, I have not, of course, overlooked *Roundell v. Breary*. Had that case been as reported in the books, it would have been very important to have considered how far it was a binding authority ; but on examination of the record, it appears to have been a perfectly different case, and to have been one in which there was an intention to charge particular lands by reason of a schedule having been prepared for the purposes of the settlement. *Roundell v. Breary* therefore comes within the same description as *Wellesley v. Wellesley* and *Deacon v. Smith*, where Lord HARDWICKE points out the real difficulty in such cases with reference to the Statute of Frauds.

\* On the ground that there is no authority for extending \* 319 a covenant of this description, so as to hold it to create a

lien on all the lands of the covenantor on the day named, and having regard to the decision in *Freemoult v. Dedire*, and to the observations which have just fallen from the Lord Chancellor, in which I entirely concur, I think this covenant not sufficient to create a lien on the property in question.

On all these grounds the plaintiff's bill must be dismissed.

Bill dismissed without costs.

#### ROUNDELL v. BREARY.

1704. February 22. 1705. May 9. Before Sir NATHAN WRIGHT, Lord Keeper.

A father in contemplation of his son's marriage covenanted within one month to convey and settle lands to the value of 150*l.* to uses for the benefit of the intended husband and wife and their family. Pending the treaty for the marriage, particular lands were agreed to as those to be settled, but no conveyance was executed. The father and the son's wife died, and the son married again, and settled the lands in question on his second marriage. *Sensible*, by the Lord Keeper Sir NATHAN WRIGHT, recommending a compromise by which the suit was terminated, that the plaintiff, the only child of the first marriage, ought to be relieved as against her father, the heir-at-law of the settlor, but not beyond the descended estate.

THIS case was compromised, and no decree appears to have been entered in the registrar's book; but the following particulars were read by the Lord Justice TURNER from the pleadings, the evidence and the minute-books of the day.

The bill stated in substance as follows:—

In 1673 Henry Breary (father of Dr. William Breary) and Dr. Hitch entered into a treaty in contemplation of a marriage between Dr. William Breary and Mary, daughter of Dr. Hitch.

On the 17th of September, 1673, a deed was executed, whereby Henry Breary covenanted within ten days to pay 40*l.*, and within one month to convey and settle lands of 150*l.* per annum, as to lands of the value of 120*l.* per annum, to the use of Dr. William Breary for ninety-nine years, if he should so long live, and subject thereto to the use of Mary Hitch for her life, with remainder to the use of the first son of the marriage for ninety-nine years, with remainder

to the use of the heirs male of first son, with remainder to the second \* 320 and other \* sons successively in tail, with remainder to the daughters in

tail, with remainder to the use of Dr. William Breary in fee; and as to lands of the value of 30*l.* per annum (being the residue of the lands to be so settled), to the use of Dr. William Breary in fee. And Dr. Hitch thereby covenanted to demise a rectory to Dr. William Breary, and to convey the next presentation to another living, and to pay 1000*l.* to be laid out in land.

Immediately after the marriage Henry Breary put Dr. William Breary into possession of lands of the value of 150*l.* per annum, and conveyed them to the uses aforesaid, or ought so to have done.

Dr. Hitch performed his covenants, and died in 1676; and Dr. William Breary was presented after Dr. Hitch's death to the living.

Henry Breary died soon after the marriage: Dr. William Breary was his executor, and took other lands to the amount of 100*l.* a year as heir to his father, and personal estate as executor.

The plaintiff, Mrs. Roundell; was the daughter and only child of Dr. William Breary by his first wife Mary Breary, who died in 1680.

In the same year Dr. William Breary married again, and his widow, one of the defendants, claimed a jointure under the settlement made on the second marriage.

In March, 1704, Dr. William Breary died, leaving a son by the second marriage, who was another of the defendants, his heir-at-law, and leaving his second wife surviving.

By their answer his widow and heir did not admit the alleged possession of lands under the first settlement, or that the late Dr. William Breary was his father's executor, and they said that Henry Breary's personal estate was not sufficient. They admitted that the lands descended to Dr. William Breary, and admitted assets of Dr. William Breary.

And the widow, as to her title to jointure, alleged as follows:—

" And this defendant Elizabeth Brearey confesseth, that after the death of the said Mary, the complainant Sarah's mother, the said Doctor Brearey, entered into a treaty of marriage with this defendant, which being concluded upon, this defendant sayeth and hopeth to prove, that in consideration of the said intended marriage with her this defendant, and before the solemnization thereof, the said Doctor Brearey, this defendant's late husband, by lease and release bearing date the 4th and 5th days of June, 1679, made between the said Doctor William Brearey, this defendant's late husband, of the one part, \* and George Prickett, of the city of York, esquire, of the other part, settled divers lands and tenements (the particulars of which lands and tenements are contained in a schedule hereunto annexed, intituled a Schedule of the Lands and Tenements settled upon this defendant Elizabeth Brearey upon her marriage with the said Doctor William Brearey her late husband, which this defendant desires may be accepted as part of this her answer), to the use of the said William Brearey until the then intended marriage should take effect, and after the solemnization of the said intended marriage to the said William Brearey for life, and after his decease to this defendant Elizabeth Brearey for life, remainder to the right heirs of the said William Brearey; and by lease bearing date the said 5th June, 1679, made between the said Doctor William Brearey of the one part, the said George Prickett and Mark Brearey, of the city of York, merchant, of the other part, settled other lands and tenements, also mentioned in the said schedule hereunto annexed, upon the said George Prickett and Mark Brearey, their executors and administrators, for ninety-nine years, in trust for the said William Brearey until that the intended marriage should take effect, and after the solemnization of the said intended marriage to the said William Brearey for so long of the said term of ninety-nine years as he should live, and after his decease to the use of this defendant Elizabeth Brearey for so long of the said term of ninety-nine years as she should live, and after her decease to the executors and administrators of the said William Brearey for the remainder of the said term of ninety-nine years,

as by the said several deeds of settlement now in the custody or power of this defendant, relation being thereunto had, will and may more fully and at large appear."

In support of the bill the Rev. John Moor was examined, and deposed as follows: —

" 2 & 3. To the second and third interrogatorys sayth, that in summer, in the year one thousand six hundred and seaventy-three, there was a treaty set on foot betwixt Doctor Robert Hitch and Mr. Henry Brearey, and other friends on both sides, in order to bring about a marriage between the said Doctor William Brearey and the said Mrs. Mary Hitch, and at which treaty this deponent was sometime present, and says that for a long time the said Doctor Hitch could not be prevailed upon to advance more than the sum of seven hundred and fifty pounds in money as part of the marriage portion of the said Mrs. Hitch his daughter, till he was overperswaded by Doctor Anthony Marshall, his brother, to make up the said money one thousand pounds. And this deponent very well remembers, that, over and above the said sume of one thousand pounds, it was concerted and agreed between the said Doctor Hitch and Mr. Henry Brearey, that in further part of the marriage portion of the said Mary Hitch, the said

Doctor William Brearey was to enter upon the liveing of Adle after he  
\* 322 had \* taken ecclesiasticall orders upon him, and to serve the cure there,  
and to take and receive the profits thereof to his own use ; and likewise,  
in further part of the said portion, the said Doctor Hitch was to settle the next  
turne to the rectory of Guisley upon the said William Brearey ; all which agree-  
ment was reduced into writing and executed under the respective hands and  
seales of the said Henry Brearey and Doctor Hitch, one part whereof being now  
produced and shewn to this deponent, and purporting to be an indenture of cov-  
enants bearing date the 17th day of September, in the twenty-fifth year of King  
Charles the Second, and made or mentioned to be made between the said Henry  
Brearey of the one part and the said Doctor Robert Hitch on the other part,  
this deponent did see duly executed by the said Mr. Henry Brearey, and did  
thereunto set his hand, amongst others, as a witness to the signing, sealing, and  
delivery thereof, and believes he was also a witness to the other part executed by  
the said Doctor Robert Hitch, but for more certainty refers himself to the same ;  
and further saith that the said indenture of agreement was drawn by Mr. Ser-  
jeant Pricket, deceased, by the directions of the said Doctor Hitch and Mr.  
Brearey, or their order, and part thereof of the said serjeant's handwriting ; and  
further says, that he verily believes the said marriage took effect, and was sol-  
emnized about the beginning of the yeare one thousand six hundred and  
seaventy-four, or at the latter end of the yeare one thousand six hundred and  
seaventy-three, which was after the execution of the preceding indenture before  
mentioned.

" 4, 5, 6. To the fourth, fifth, and sixth interrogatorys sayth, that he verily  
believes that instructions or directions were given by Doctor Brearey to the  
above-named Mr. Serjeant Prickett, then only counsellor at law, to make ready  
a draft for settling such lands and tenements as are mentioned in the two paper

writeings now shewn to this deponent, and to such uses as are therein mentioned, for that the said paper drafts, as this deponent believes, were in the handwriting of the then Mr. Prickett's clerk, and were either brought or sent by the said Doctor William Brearey (but, as this deponent thinks, rather by himself brought) to Guisley for the said Doctor Hitch to peruse, and the said draft was copyed over by one Arthur Crossfield, then schoolmaster of Guisley, as this deponent verily believes, for that he, this deponent, did compare the said coppys now to him shewn, as is above mentioned, with the said draft, . . . did interline severall words with his own hand upon the examination thereof, which said coppys are by way of lease and release, with dates in the 26th year of the reign of King Charles the Second, and are mentioned to be betwixt Henry Brearey, of the city of York, gentleman, William Brearey, of the said city, gentleman, and Mark Brearey, of the said city, merchant, of the one part, and Anthony Marshall, doctor of divinity, John Geldart, of Wiggenthalope, in the county of York, esquire, and George Rodes, of \* Sowtherton, in the same \* 323 county, gentleman, being the same three trustees as are mentioned in the before-mentioned indenture of marriage; and this deponent further saith, that he verily believes the said first rough draft was either carried back by the said Doctor Brearey or sent by some safe hand to York, in order to be ingrossed; but whether the same were ingrossed, or why they were not, this deponent cannot remember."

" 9. To the ninth interrogatory saith, that he was by and present when Doctor Brearey, above named received several sums of money from his father-in-law, Doctor Hitch, as part of the 1000*l.* given in marriage with the said Mrs. Mary Brearey, and particularly on the 20th of September, 1676, Doctor Brearey being then at York, at the deanery, with Doctor Hitch, the said Doctor Hitch did borrow of one Sir George Marwood, baronet, the sum of 100*l.* upon two several bonds, and also the sum of 50*l.* more from a gentleman then lodging in Stonegate, in the said city of York, for to pay to the said Doctor Brearey as part of his wife's portion, which money was, as this deponent remembers, to be paid by the said Doctor Brearey in part of purchase-money for lands he had bought at Keswick, in the said county of York, which this deponent believes were bought pursuant to the marriage articles before mentioned; and this deponent further says, he believes there was another 50*l.* borrowed at the same time by the said Dean Hitch to make up the sum of 200*l.*, which said sum of 150*l.*, or 200*l.*, this deponent well remembers was repaid by the said Dr. Hitch out of his own proper money, 50*l.* of which this deponent himself paid to the said Sir George Marwood; and further saith, that upon the receipt of the said 150*l.*, or 200*l.*, the said Doctor Brearey did own and acknowledge, in this deponent's hearing, to have received the sum of 900*l.* in part of 1000*l.* due to the said Doctor Brearey for part of his wife's portion."

" 22. To the last interrogatory saith, that he was very well acquainted with the character and handwriting of Doctor Brearey, and does verily believe the letter now produced and shewn to him at his examination, bearing date from London, August 22, 1673, beginning 'my dearest joy,' and ending 'Madam that I love you most tenderly and most faithfully, I am your' (but the name that has been subscribed to the same torn out), was all of the proper handwriting

and character of the said Doctor Brearey; tho there is no superscription or direction thereupon, or name thereto subscribed, which said letter this deponent received, amongst others, from the complainant Mrs. Roundell; and this deponent believes the same was directed and designed for Mrs. Mary Hitch, the said Doctor Brearey's then mistress, and afterwards the plaintiff's, Mrs. Roundell's, mother."

\* 324     \* The following are the extracts from the minute-books:—

LORD KEEPER.

Minute Book A., 1704-5. [22d February, 1704.]

ROUNDELL v. BRERY.

**BELLASIS.** — The bill is to have the benefit of marriage articles, and to be let into the possession of 120*l.* per annum.

*Prickett*, for defendants Elizabeth and William, and Elizabeth says she is a purchaser for valuable consideration, and she saith she hath assets to answer any debt of Doctor Brery, but not for any breach of covenant, and the defendant William says the plaintiff is not entitled to the demand in the bill.

*Serjt. Hooper*, for plaintiff. — We are the daughter and heir of Dr. Brery by his first wife, whereas there were articles for settling 150*l.* per annum, which were never performed, and the defendant claims under articles on the second marriage, whereof they had notice, for both articles were drawn by the same counsel.

*Pooley*, for plaintiff. — This Henry Brery was the father of Dr. Brery, and the doctor married the daughter of Dr. Hitch, with whom he had near 5000*l.*; and by the articles on that marriage, there was an estate of 120*l.* per annum to be settled, and in pursuance of certain articles we were let into the possession, and now they pretend that Henry did not thereby covenant for him and his heirs, and now the defendant doth refuse to make a settlement. The said Dr. Brery marrying a second wife hath made a settlement of the estate on the issue of that marriage.

[Shall read articles.]

The articles between Dr. Brery and Dr. Hitch on the first marriage with Mary, the daughter of Dr. Hitch, dated the 17th September, 1673, read.

[John Moore read.]

[The deed of Robert (being a draft only, and never executed) read.]

[Rebecca Prickett read.]

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*Cheshire*, for plaintiff. — Dr. Brery declared before his death, that he had settled 120*l.* per annum on his daughter, and that nothing can hinder it from coming to her.

[John Bollin read.]

\* *Serjt. Hooper*, for Quer. — We were put into possession of the very lands mentioned in the draft of release. \* 325

[Christopher Brery read.]

[John Barnes read.]

[Matthew Storey read.]

[Matthew Balliocke read.]

*Serjt. Hooper*, for the plaintiff. — We have fully proved our articles, whereby the estate was agreed to be settled, and have proved the draft of a deed, and that the same, with the subsequent settlement, was drawn by one and the same counsel, and that they must needs have notice of it.

*Payne*, for plaintiff.

*Mr. Cooper*, for defendant Elizabeth Brery, widow of Dr. Brery, and of William Brery, the heir-at-law of Dr. Brery on his second marriage: And do insist that, by the articles, the plaintiff can have no relief out of the personal estate, the assets of Henry being all administered, and then the plaintiff cannot have relief against the defendant William as heir, and the defendant is not bound as heir, for no particular lands are mentioned in the articles, but that lands shall be settled; and the pretence of notice, for that the first and second articles were drawn by one and the same counsel is very strange, as if all counsel should remember what writings they should draw where there be several years between one and the other.

*Dobbins*, for the defendant. — We are a purchaser for valuable consideration without notice, and they cannot affect us, or any personal or real assets in our hands, for we have no personal assets; yet in memory of our husband have offered to give them 1000*l.*, and they might have had that on bill and answer, and that they have refused.

*Vernon*, for the defendant. — There be no particular land named, and it might be land to be purchased, and so the heir cannot be bound, he not being named to be bound; and — for the personal estate — there can be no relief out of estate (it) being disposed among the younger children of Dr. Brery (there being eight of them) and they cannot affect us as executor or heir, yet we have offered

them 1000*l.* in honour of our husband, and being a purchaser for valuable consideration (it) cannot affect us; and shall read our settlement.

[The deed of settlement on the second marriage of Dr. Brery, dated 8th June, 1679, read.]

[The deed of settlement of lease for ninety-nine years as additional settlement, dated the same day of the former deed (for so many years as Elizabeth should so long live) read.]

\* 326 \* [Rebecca Prickett read to prove that Dr. William Brery had left six children, and that Henry Brery died indebted.]

[Mary Burnett read.]

*Vernon*, for the defendant. — In the case of *Worth v. Street*, which was just as this was, they could never get the lands from Street, who has assigned them to Sir Francis Winnington.

*Serjt. Hooper*. — We have a letter also in Dr. Brery's handwriting, which desire may be read.

[John Moore read.]

[The letter read dated 22d August, 1763.]

*Serjt. Hooper*, for the plaintiff. — Do insist the father of the defendant accepted of the articles, and the defendant is his heir, and immediately after the articles the son was put into possession, and notwithstanding the articles, which, though not a perfect conveyance, is a lien on the land. The Court doth usually supply the defect of such conveyances; and do conceive our proof of notice is material, and in a letter notice this had prevailed against another person, and so adjudged in the case of *Standish v. Sillock*, for there notice did prevail by reason of a young man's copying of a bond when he was a young clerk.

*Pooley*. — Where there is an agreement to charge land it must be to affect the land the man had.

*Cheshire*, for the plaintiff. — We brought 5000*l.* into the family, and if we can be relieved we ought to be relieved, and if we cannot affect the defendant's jointure any further than as to so much of the lands as are particularly mentioned therein; but we must wait for the reversion, and on the circumstances of the case do hope we shall be relieved to carry the articles into an execution.

*Cur.* — As to the heir-at-law, there is a direct right on a fair and plain agreement, and ought to be helped as far as can, but cannot be helped beyond the estate of Henry Brery, and do propose for an accommodation that 500*l.* be

added to the 1000*l.* formerly offered and paid in satisfaction of plaintiff's demand, which being not agreed to, will consider of case and deliver opinion.

1705. May 9.

**ROUNDELL v. BRERY.**

*Cur.* — On the proposition of the Court, and by consent of the defendant Mrs. Brery, now present in Court, decree defendant to pay the plaintiff 1100*l.* at Michaelmas next without interest, or the 1100*l.* to carry interest at 5 per cent, and on payment to give a general release and deliver up the articles.

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**\* POOLEY v. QUILTER.**

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1858. March 16. Before the LORDS JUSTICES.

A creditor under a bankruptcy sold the dividends to be received upon the proof of his debt. It appeared that, as to a proportion of the purchased dividends, the purchaser had bought them on behalf of one of the creditors' assignees. In a suit by the vendor to set aside the sale, the Vice-Chancellor held, that the validity of the sale (as to the proportion bought on behalf of the assignee and as between him and the vendor) depended on the fact of the vendor believing, or having sufficient reason to believe, that the purchase was made for the assignee's benefit; that if such belief existed, the purchase would enure for the benefit of the general creditors to the extent of the assignee's interest; and his Honor directed issues to determine that fact; and held, that the purchase was valid as to the other proportions. But held, upon appeal, that the transaction was altogether void, irrespectively of the vendor's belief, and the purchase was set aside.<sup>1</sup>

A suit instituted in 1856 to set aside a sale made in 1853 not too late unless under special circumstances. Respondents ordered to pay the costs of the appeal.<sup>2</sup>

Observations upon the duties of assignees.

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<sup>1</sup> See *Davoue v. Fanning*, 2 John. Ch. 252, 264; *Ex parte James*, 8 Ves. (Sumner's ed.) 337, notes and cases cited; *Ex parte Bennett*, 10 *i.b.* 381 *a*, and notes; *Whichcote v. Lawrence*, 3 *i.b.* 740, note (*a*); *Campbell v. Walker*, 5 *i.b.* 678, note (*a*); 1 Story Eq. Jur. § 322; *Harrison v. Monk*, 10 Ala. 185; *Cram v. Mitchell*, 1 Sandf. Ch. 251; 1 Dart V. & P. (4th Eng. ed.) 26, 27; *Sugden V. & P.* (14th Eng. ed.) 687, 688, and note.

<sup>2</sup> See as to laches, 1 Story Eq. Jur. § 771; *Fry Spec. Perf.* (2d Am. ed.) 422 and note (10), 423, 424.

THIS was an appeal from a decision of Vice-Chancellor KIN-DERSLEY.

The decree under appeal was pronounced in a suit instituted by Alexander Gopsell Pooley against William Quilter, Henry Augustus Burge and Felix Prior, the creditors' assignees, and Herbert Harris Carman, the official assignee under the bankruptcy of George Hennet, and also against John Whidborne and William Caird, Robert Hurrell and Charles Turner Lewis, the three latter of whom were the executors of Stephen Brunskill.

The bill was filed for the purpose of having it declared that some purchases from the plaintiff of dividends to which he was entitled under the bankruptcy of Hennet were void, and that the defendants were trustees for the plaintiff of those dividends, after deducting the amount paid by the defendant Whidborne upon the purchases, and for the relief consequent upon this declaration.

The material facts of the case were these : —

The defendant Quilter was a partner in the firm of Quilter, Ball, & Co., accountants in the city of London, and before the \* 328 bankruptcy of Hennet this firm was employed \* by him in the investigation of his affairs. The defendant Whidborne was a solicitor at Teignmouth, and was the solicitor of Hennet before and up to the time of his bankruptcy. Stephen Brunskill, whose executors were the other defendants, was the person who advanced the money for the first of the purchases in question.

On the 24th of March, 1853, George Hennet was adjudicated a bankrupt. The defendant Carman was appointed the official assignee under the bankruptcy, and, in the month of April, 1853, the defendants Quilter, Burge, and Prior were chosen to be the creditors' assignees. The defendant Quilter was the principal acting creditors' assignee. Ball, the partner of the defendant Quilter, was appointed accountant under the bankruptcy.

At the time of the bankruptcy the plaintiff Pooley was the holder of Hennet's bills to the amount of 33,443*l.* 11*s.* 2*d.*, but his right to prove for that amount was disputed. On the 28th of July, 1853, however, a claim was allowed to be entered on his behalf under the bankruptcy for 29,568*l.* 6*s.* 8*d.*; and between this time and the 25th of October, 1853, the assignees and their solicitors were satisfied that he was entitled to prove for 23,443*l.* 11*s.* 2*d.*

The plaintiff Pooley, it appeared, had, before the 25th of Octo-

ber, 1853, offered to sell his debt to the defendant Quilter, and one of these offers appeared to have been made before it was ascertained to what amount the proof could properly be admitted, but the defendant Quilter stated that he declined to entertain any offer until the solicitors of the assignees were satisfied as to the amount which ought to be proved.

\* The amount to be proved being agreed upon, the \* 329 plaintiff Pooley, on the 25th October, 1853, wrote to the defendant Quilter as follows :—

“ 29, Nicholas Lane, October 25, 1853.

“ Sir,—I hold of Mr. Hennet's bills 33,433*l.* 11*s.* 2*d.* I am willing to abandon my proof against the estate for 10,000*l.*, provided you allow me to return to D. L. Lewis 10,000*l.* bills, and render me such aid as you are able, to recover from him such sum as I should be entitled to. The remaining bills, that is to say, 23,433*l.* 11*s.* 2*d.*, I will sell for 7000*l.* cash, on condition that I receive 2500*l.* on Friday next, on deposit of the bills and signing contract, the remainder to be paid on the 11th November next after proving the same; and any dividend the estate may pay above 8*s.* in the pound to be secured to me. This letter is, of course, without prejudice to my claim against Hennet's estate.

“ Yours truly,  
“ A. G. POOLEY.”

The defendant Quilter forwarded this letter to the defendant Whidborne, and, in consequence of this communication, on the 1st of November, 1853, a deed was executed of that date, and made or expressed to be made between the plaintiff, described as of London, iron merchant, of the one part, and John Whidborne, of Teignmouth, in the county of Devon, esquire, of the other part. It recited that the plaintiff, as one of the creditors of George Hennet, a bankrupt, was entitled to prove under the bankruptcy to the amount of 23,443*l.* 11*s.* 2*d.*, which was admitted to be provable upon the estate. It further recited that no dividend had yet been paid upon the estate, and that the parties thereto anticipated or had reason to believe that there would be a dividend or dividends payable under the bankruptcy exceeding 8*s.* in the \* pound. It further recited that the plaintiff had agreed \* 330 with the defendant Whidborne to sell to him the debt of

23,443*l.* 11*s.* 2*d.*, subject, nevertheless, to his repaying to the plaintiff all sum and sums of money as thereinafter mentioned that might be payable by way of dividend thereon exceeding and after payment of the dividend of 8*s.* in the pound, when and as Whidborne might receive the same under the bankruptcy by virtue of the assignment thereinafter contained. By the witnessing part, in consideration of the sum of 7000*l.* paid by Mr. Whidborne to the plaintiff at the time of the execution, the plaintiff assigned in the usual way to Mr. Whidborne, "all that the said sum of 23,443*l.* 11*s.* 2*d.*, being the said debt due and owing to him the said Alexander Gopsell Pooley from the said George Hennet, and admitted to be provable as hereinbefore recited against the said estate, and also all dividend and dividends, sum and sums of money, to be due and payable for the same," to hold to Mr. Whidborne in the usual way, subject to the provision thereinafter contained in reference to the excess of dividend to become payable under the said bankrupt's estate over and exceeding 8*s.* in the pound of the debt. There was the usual power of attorney and a provision for restoring the surplus beyond 8*s.* in the pound to the plaintiff.

To that instrument was annexed a paper in these terms, signed by Mr. Pooley : —

"Memorandum, that, although it is stated by the within deed that the consideration sum of money of 7000*l.* was paid at or before the sealing and delivery of the within indenture, yet it is hereby declared by the said Alexander Gopsell Pooley and the said John Henry Mackenzie, on behalf of the said John Whidborne, that such consideration money was not so paid, and that the whole amount thereof remains unpaid; and it is agreed \* 331 by and between the within-named \* parties, that on proof of the said debt of 23,443*l.* 11*s.* 2*d.* by the said Alexander Gopsell Pooley against the estate of the said George Hennet being admitted by the commissioner under the bankruptcy against George Hennet, and on the same being admitted on the file of the proceedings under such bankruptcy, the consideration money of 7000*l.* shall be paid by the said John Whidborne to the said Alexander Gopsell Pooley, and the within assignment and the bills therein referred to handed over to the said John Whidborne, or as he shall direct."

Afterwards, on the 11th of November, 1853, a dividend meeting was held under the bankruptcy, at which the debt of 23,443*l.* 11*s.* 2*d.* was proved, and a dividend of 2*s.* 6*d.* in the pound was declared. The 7000*l.* purchase-money was then, or within a few days afterwards, paid to the plaintiff Pooley, and the defendant Whidborne received 2*s.* 6*d.* dividend upon the debt, to the amount of 2930*l.* 8*s.* 11*d.* Subsequently, on the 24th of March, 1854, a further dividend of 5*s.* in the pound was declared under the bankruptcy, and the defendant Whidborne received this dividend also, to the amount of 5860*l.* 17*s.* 9*d.*

In the mean time, in the month of February, 1854, there had been a negotiation between the plaintiff Pooley and the defendant Whidborne for the purchase of the plaintiff's further interest in the dividends upon the debt which had been proved, but the terms were not then agreed upon. Ultimately, however, an agreement was come to for the purchase by the defendant Whidborne of the further interest in these dividends. The agreement was as follows:—

"Memorandum of agreement made the 3d day of \*April, \*332  
1854, between Alexander Gopsell Pooley, of Nicholas Lane,  
London, bill-broker of the one part, and John Whidborne, of  
Teignmouth, Devon, gentleman of the other part, whereby, in con-  
sideration of the sum of 812*l.* 10*s.* sterling to the said Alexander  
Gopsell Pooley in hand well and truly paid by the said John Whid-  
borne before the execution hereof, as he the said Alexander Gop-  
sell Pooley doth hereby acknowledge, he the said Alexander  
Gopsell Pooley doth hereby agree to sell and assign to the said  
John Whidborne, his executors, administrators, and assigns, the  
whole of his remaining right and interest of and in the debt or  
sum of 23,443*l.* 11*s.* 2*d.* proved by the said Alexander Gopsell  
Pooley under the bankruptcy of George Hennet, over and beyond  
the dividend of 8*s.* in the pound in an indenture of assignment,  
dated the 1st day of November, 1853, and made between the said  
Alexander Gopsell Pooley of the one part, and the said John  
Whidborne of the other part, mentioned, and of and in all future  
dividend and dividends henceforth to be declared in respect of the  
said debt of 23,443*l.* 11*s.* 2*d.*; and the said Alexander Gopsell  
Pooley further agrees to execute to the said John Whidborne, at  
his expense, any further deed as counsel may advise to be neces-

sary for better assigning to him the said right and interest of the said Alexander Gopsell Pooley hereby agreed to be sold, with all necessary powers for receiving and giving discharges for the same; and the said Alexander Gopsell Pooley doth hereby authorize and empower the official assignee under the bankruptcy of the said George Hennet to pay over to the said John Whidborne all further dividend and dividends to be declared in respect of and upon the said debt of 28,443*l.* 11*s.* 2*d.*"

The plaintiff Pooley had also a further claim upon the bankrupt's estate upon another bill for 750*l.*, and on the 26th of May,  
\* 333 1854, the defendant Whidborne purchased \* from the plaintiff this further claim for the sum of 300*l.* This debt, however, had not yet been proved under the bankruptcy, the plaintiff's affidavit in support of the proof having been delivered to the defendant Whidborne, but not yet carried in by him.

The first of the three several purchases above mentioned was made in the name of the defendant Whidborne, for the benefit of the defendant Quilter to the extent of a moiety, of Stephen Brunskill to the extent of two-thirds of the other moiety, and of the defendant Whidborne himself to the extent of the remaining third of that moiety. The other two purchases were made for the equal benefit of the defendants Quilter and Whidborne, and the bill sought to set aside all these three purchases.

On the part of the plaintiff it was stated that he did not know until the month of May, 1856, that the defendant Quilter was beneficially interested in the purchases in question. The defendants, however, asserted that the plaintiff was throughout aware of the defendant Quilter being so interested.

By the decree under appeal the bill was dismissed as against the defendants William Caird, Robert Hurrell, and Charles Turner Lewis (Mr. Brunskill's executors), and also against the defendant John Whidborne, so far as the same sought to affect his beneficial interest in the assignment of the 1st of November, 1853, and the two assignments of the 3d of April, 1854, and the 26th of May, 1854, with costs to be paid by the plaintiff, and the following issues were directed: —

1. Whether at the time when the plaintiff Alexander Gop-
- \* 334 sell Pooley, by indenture of assignment bearing date \* the

1st of November, 1853, assigned to the defendant John Whidborne all his the said Alexander Gopsell Pooley's dividends not exceeding 8s. in the pound, to accrue upon a debt proved, or to be proved, by him upon the estate of George Hennet, a bankrupt, the plaintiff Alexander Gopsell Pooley believed, or had sufficient reason to believe, that the defendant William Quilter was beneficially interested in the purchase of the said dividends assigned by the above-mentioned indenture to the said John Whidborne.

2. Whether at the time of the execution of a certain memorandum of agreement, dated the 3d day of April, 1854, whereby the plaintiff Alexander Gopsell Pooley assigned to the defendant John Whidborne the whole of his remaining interest in the said debt proved on the estate of the said George Hennet, over and above the said dividends of 8s. in the pound, the plaintiff Alexander Gopsell Pooley believed, or had sufficient reason to believe, that the said defendant William Quilter was beneficially interested in the purchase of the said debt assigned by the last above-mentioned memorandum to the said defendant John Whidborne.

3. Whether at the time of the execution of a certain other memorandum of agreement, dated the 26th of May, 1854, whereby the plaintiff Alexander Gopsell Pooley assigned to the defendant John Whidborne all the dividends to become payable to him upon another debt proved, or to be proved, upon the estate of the said George Hennet, the plaintiff Alexander Gopsell Pooley believed, or had sufficient reason to believe, that the defendant William Quilter was beneficially interested in the purchase of the said dividends assigned to the defendant John Whidborne by the said lastly mentioned memorandum.

\* The grounds on which his Honor made this decree will \* 335  
be found stated in the report of the case below, in the 4th  
volume of Mr. Drewry's Reports, p. 184.

*Mr. Glasse* and *Mr. De Gex*, for the plaintiff.—First. With regard to the portion of the dividends in which the defendant Quilter was to be beneficially interested. It is conceded that he cannot hold this portion for his own benefit. The only question therefore is, whether it belongs to the plaintiff or to the general creditors. Now it is impossible to understand on what ground the

general creditors can be entitled to it. They have given no consideration for it, nor have they contracted for it in any way. It is true that in one of the cases, in which a similar purchase was impeached, *Ex parte James* (*a*), the benefit of it was held to belong to the estate; but in that case it distinctly appears that the vendor did not seek to set aside the contract, or make any claim whatever, as indeed he could not have done under the jurisdiction in which the decision was made. The assignee had therefore obtained a benefit, which the person for whom he received it did not wish to withdraw, and the only question was, for whom was he to retain it? Being a trustee, and having acquired it in that capacity, he could, of course, only hold it for the benefit of his *cestuis que trustent*. But such a principle has no application where the vendor disputes the validity of the transaction. It is there set aside on the ground of its being fraudulent as against the grantor, and such a fraud cannot be the foundation of a title in the creditors any more than it can in the grantee, through whom they must claim as against the grantor. *Barton v. Hassard* (*b*) indeed disposes of the question, for though the \*case there was of an executor and legatee, the principle is the same.

\* 336 Next, with respect to the proportions in which the defendants Whidborne and the executors of Mr. Brunskill claim to be interested, their title can be no better than Mr. Quilter's. Their purchase was part of the same transaction, obtained by means of the same inequality of knowledge between the contracting parties, and the same fiduciary relation. The purchase must, therefore, be wholly set aside.

*Mr. Swanston* and *Mr. Giffard*, for the defendant Quilter.—As regards this respondent there is no question as to his retaining the benefit of his purchase. He does not seek to do so. In this Court the rule that an assignee cannot purchase a dividend, for his own benefit, is well understood. It is not so in the world at large, and Mr. Quilter was wholly ignorant of it. But as soon as he was informed of the existence of such a rule, he did all that was in his power, that is to say, he offered at once to give to the estate the benefit of his purchase. The vendor had no pretence for claiming to set it aside. He knew all the circumstances of the

(*a*) 8 Ves. 337.

(*b*) 3 Dr. & War. 461.

case. He must have been aware that Mr. Whidborne was purchasing on behalf, to some extent, of Mr. Quilter. All the facts show that this was so. The plaintiff knew that Mr. Whidborne took no step in the matter without consulting Mr. Quilter, and must have inferred, if he did not even actually know, that the latter was interested in the purchase. But it is not necessary to discuss this question of fact, for the decree complained of, and which we are supporting, affords the plaintiff the fullest means of investigating it; and he must, by his now resisting that investigation, be taken as admitting (at all events for the purpose \* of the argument) that the result of it would be \* 337 unfavourable to him. Assuming then, that the plaintiff knew that Whidborne treated throughout under the advice and partly for the benefit of Quilter, how is it possible for him to call on the Court to relieve him from a bargain which he made with his eyes open, especially when he took no step to complain until that which was at the time of the bargain hazardous and uncertain had in the event proved safe and profitable? The most important of the transactions was the first. It would be of small moment to set aside the subsequent ones only. But in the first transaction the very recitals of the agreement show that a profit was contemplated. The bill proceeds upon the erroneous notion that a dealing of this kind between a trustee and his *cestui que trust* is in every case void. The rule is nowhere so laid down. There are many descriptions of trustees to which it does not apply, and indeed it has only been applied to the case of a trustee for sale. The principle, as Lord ST. LEONARDS (*a*) lays it down, is not that a trustee cannot buy from his *cestui que trust*, but that he cannot buy from himself. He cannot be buyer and seller too. Moreover, we deny that Quilter was a trustee for the plaintiff. He was a trustee for the creditors at large, and therefore towards any particular individual claiming to be creditor he was in a position of antagonism, and not of confidential relation. Indeed, at the date of the agreement, the plaintiff's proof had not been admitted, and it was not till afterwards that the plaintiff was even admitted to be one of the persons entitled to participate in the assets. Pooley was a bill broker, whose business it was to know other people's affairs, and there is no pretence for saying, after the communications which had

(*a*) Handy Book of Property Law, 36.

taken place between him and the bankrupt and Mr. Whidborne, that he was not as fully informed as Quilter \* or Whidborne, both as to the amount of the dividend, and as to the time when it would probably be declared ; the facts being, however, that, owing to the speculative character of the bankrupt's dealings no one could know either of these matters with any thing like certainty, and that the bargain might very possibly have been a losing one for the purchasers. It certainly did not appear to have occurred to Lord ELDON, either in *Ex parte Lacey* (a) or in *Ex parte James*, (b) that an assignee might not well purchase a dividend, although when purchased it would belong to the estate. In the former case Lord ELDON said : " But it is enough to say that the assignee was a trustee for the benefit of those entitled to the interest in the residue. He must buy for them, and not for himself. Therefore, as to the debts bought, this assignee must be a trustee, either for the creditors or for the bankrupt, for which, upon the circumstances, is doubtful yet." In the case of an heir, trustee, or executor purchasing incumbrances or debts, it has been always held, not that the purchases were void, but that the estate was entitled to the benefit of the purchase : *Lancaster v. Evors*; (c) and the present case much more resembles those than it does *Barton v. Hassard*. (d)

*Mr. Wickens* (with whom was *Mr. Bailey*), for the defendant Whidborne. — Cases of this description may be divided into three classes. First, those where a vendor seeks to set aside a sale on the ground of concealment or misrepresentation. Secondly, those in which a fiduciary purchases an incumbrance affecting the trust estate. Thirdly, cases uniting both the above elements. The present case falls within the second of these classes, and in no instance of \* that kind has it ever been suggested that the transaction is bad as between the vendor and the purchaser. The benefit of the purchase belongs to the trust estate, so far as the purchase has been made by the trustee, but as between the vendor and the trustee the transaction cannot be impeached. In all the cases in which such a transaction has been set aside as between the vendor and purchaser, there will be found to have existed

(a) 6 Ves. 626.

(b) 8 Ves. 337.

(c) 10 Beav. 154. See *Robinson v. Pett*, 3 P. Wms. 251, note (a).

(d) 3 Dr. & War. 461.

the element of undue influence, misrepresentation or concealment of what the vendor was bound as between himself and the purchaser to communicate: none of which can be established in the present case.

There is here no suggestion of undue influence. It has been suggested that the purchasers knew more than the vendor could know, but that fact of itself could not vitiate a sale unless it was the duty of the purchasers, from some special relation between themselves and the vendor, to communicate to the latter whatever they knew. No such duty existed here. Moreover, from the nature of the transaction, the vendor was aware that the purchasers knew, or had the means of knowing, the precise state of the case as regarded the solvency of the estate. Therefore the bill, if it can be supported at all, must be rested on misrepresentation made by the purchasers to the vendor, and this could relate only to the amount of the dividend to be paid, or to the time at which it should be payable. That the dividend was expected to exceed 8s. in the pound was stated in the first deed of assignment, and the first purchase was of the dividend not exceeding 8s. Misrepresentation as to the amount is, therefore, as regards that transaction, out of the question. It was not, indeed, stated in the assignment when it would be likely to be payable; but there is no proof of any misrepresentation in this respect, and, in fact, the probability is, that at the time of the first sale no one \* could do more \* 340 than form a guess on the subject. But when Pooley made the second sale, he knew what the result in this respect had been. The second sale was an admission by the vendor that nothing which had at that time transpired had induced him to think that he was misled in making the first. Yet, at the time of the second sale, he knew what dividend had been paid, and when. The second sale did not turn out an advantageous one to the purchasers, or not materially so, and the real object of the bill is, to get rid of the first sale. But how can the vendor say that the circumstances were misrepresented to him at the time of the first sale, when, knowing the result of it, and without objection, he entered into a second and supplemental transaction founded on it?

Moreover, the case now set up is different from that stated on the bill, which proceeds on the allegation that the plaintiff was unaware of Quilter being interested in the purchase.

*Mr. Shapter* (with whom was *Mr. Wickens*), for Mr. Brunskill's executors, supported the same view as that of the defendant Whidborne, and, moreover, contended that Mr. Brunskill was not proved to have had notice of Quilter having been interested in the purchase.

*Mr. Glasse* replied.

Judgment reserved.

March 16.

THE LORD JUSTICE KNIGHT BRUCE.—In the month of March, 1853, Mr. Hennet, a trader, in extensive business as a railway contractor and otherwise, was adjudicated a bankrupt, owning, I believe, at the time considerable property of various kinds, but also largely indebted. Assignees under the bankruptcy were \* 341 \* chosen and appointed in April, 1853. Afterwards, in November, in that year, in April, 1854, and in May, 1854, respectively, the plaintiff, who was one of the bankrupt's creditors, executed the first and signed the others of these instruments. [His Lordship read them to the effect stated, *ante*, p. 329–332.]

The defendant Mr. Whidborne, mentioned in these documents, signed or executed the first by an agent or attorney, his partner, Mr. Mackenzie, and also, by the same Mr. Mackenzie, signed the memorandum annexed to it. Mr. Whidborne is, and then was, a solicitor, and, I believe, a banker, likewise.

The proof of the plaintiff's greater debt (23,000*l.* and a fraction) was made under the bankruptcy on the 11th of November, 1853, the day on which a first dividend of 2*s.* 6*d.* in the pound was declared in the bankruptcy. The smaller debt has not yet, it is said, been proved under it. The three sums mentioned in the three instruments of sale as the prices contracted to be paid to the plaintiff were paid to him in the years 1853 and 1854. But, the dividends declared on the proof having been such as to render the first (if not both the first and second) of the purchases profitable, the bill in the present cause was filed in October, 1856, for the purpose of being relieved against the three sales.

It appears that each of the purchases was made by Mr. Whidborne on the behalf and account and for the benefit of himself and the defendant Quilter, and this with Mr. Quilter's privity and

consent from the beginning. It appears also that, with respect to Mr. Whidborne's share (as distinguished from Mr. Quilter's share) in the first purchase, Mr. Whidborne bought on the behalf and account and for the benefit of himself and Mr. Brunskill, now deceased, whose executors are among the \* defendants, \* 342 and claim title accordingly. The purchase-moneys paid, as already mentioned, to the plaintiff were so paid by Mr. Whidborne with the money of himself and Mr. Brunskill, or one of them, as to the 7000*l.*, and with the money of Messrs. Quilter and Whidborne, or of one of them, as to the rest. Mr. Whidborne, though not, I believe, employed under the bankruptcy, had been the solicitor, or one of the solicitors, of Mr. Hennet before his failure.

Mr. Brunskill (a tradesman or retired tradesman) appears to have acted in the matter of the first purchase wholly by and through Mr. Whidborne, and it is clear that if Mr. Whidborne cannot maintain that purchase so far as Mr. Whidborne was beneficially interested in it, neither can he on behalf of the executors of Mr. Brunskill, nor can those executors to the extent of Mr. Brunskill's interest, or for any purpose, maintain it. The plaintiff's claim to relief against the sales is founded mainly or alone on the connection with them of Mr. Quilter, whom the 16th paragraph of the bill describes in these terms:—

“The said William Quilter carries on, with Mr. William Ball, the business of accountants, under the firm of Quilter & Ball, and the said firm had been employed by the said George Hennet in his affairs previously to his bankruptcy, and subsequently thereto were employed by the assignees under the said bankruptcy to take the accounts thereunder, and by means of such employment of his said firm, and by reason of his said office of assignee, the said William Quilter had means of knowing the state of the assets of the said bankrupt, and the probable amount of the dividends which would be declared under the said bankruptcy, far superior to those possessed by the plaintiff.”

\* It is shown by the materials before us, or is a just inference from them, that the statements in that paragraph are substantially correct. The words “said office of assignee” contained in it are explained by other parts of the bill, the truth being that Mr. Quilter is one of the creditors' assignees under the bank- \* 343

ruptcy, was so originally, and has been so continually since his appointment in April, 1853. Of course, therefore, it was impossible for Mr. Quilter rightfully to acquire by purchase, for his own advantage, any interest in the subjects sold, as already stated in November, 1853, April, 1854, and May, 1854, or in any part of them. The plaintiff having, in the summer of 1856, exhibited uneasiness in the shape of a lawyer's letter not of the gentlest kind, Mr. Quilter became convinced that retention for himself was impracticable, but appears to have thought it his best course to let the estate under the bankruptcy have, if possible, the benefit of his profits so obtained. He has accordingly conceded, or professed to concede them to the assignees in that character, though admitting, as he does according to the truth, that it was on his own private account, and with a view to his own private advantage, that he joined in each purchase. His co-assignees, who are also defendants, having accepted the concession, they and all the other defendants resist the demand of the plaintiff, and unite in contending, that he has no ground of complaint nor any title to relief.

The dispute substantially narrows itself to the question between the plaintiff and Mr. Quilter; for as Mr. Whidborne, with the privity and concurrence contemporaneously of Mr. Quilter, made the purchases on the behalf and account of both of them, Mr. Whidborne did not acquire, nor has he with regard to the whole or any portion of the benefit of the purchases, a better title

against the plaintiff than Mr. Quilter would have acquired  
\* 344 \* \* or had if Mr. Whidborne, with the privity and consent  
originally and throughout of Mr. Quilter, had acted originally  
and throughout the whole of the transaction as his agent merely,  
under his instructions solely, and on his account altogether.

Is then the plaintiff entitled to relief against Mr. Quilter? That question must, in my opinion, be answered in the affirmative. As assignee he was, and is, a trustee for the creditors, of whom the plaintiff was one. The purchases, which were in effect of portions of a trust fund variously constituted, and of uncertain amount, under the management and administration of trustees for the benefit of numerous persons, were made by one of the trustees from one of those persons.

To say nothing of considerations of public policy, a purchase of this description can at least not be maintained by an assignee against

a creditor without proof that before the sale the assignee had communicated to the creditor all the information in the possession or reach of the assignee concerning the state and amount of the assets, and the likelihood or chances of their realization both as to time and otherwise, the extent of the demands on them, and the prospect as to dividends. Mr. Quilter, in the present instance, is not shown to have done so, and I consider it a just inference from the materials before us, that he had all along important knowledge and means of calculation and grounds of expectation respecting the assets, which the plaintiff had not.

It is said for the defendants that the plaintiff was aware from the beginning that he was dealing substantially with Mr. Quilter, and not alone with Mr. Whidborne, or Messrs. Whidborne and Brunskill. That circumstance, if true, I consider as of no moment. Nor do \*I agree in the view of the bill taken by \*345 the defendants, who insist (erroneously as I conceive) that it puts the plaintiff's case wholly on his alleged ignorance, when he made the sales, that Mr. Quilter was a purchaser.

The defendants also contend that the suit was instituted too late, and that the sales of 1854 amounted to a confirmation of that of 1853. Neither however to this can I accede. There was not, I think, on the plaintiff's part, any intention to confirm the sale of 1853, nor is it proved that he was aware of his right in that respect. Nothing but a special state of circumstances could render a suit instituted in October, 1856, for the purpose of setting aside sales made in November, 1853, and April and May, 1854, too late, and there is no such state of circumstances as I conceive here.

Nor is there, I think, the least ground for the argument, that any thing said by Lord ELDON in the cases cited at the bar from Mr. Vesey's reports, or in any one of them, is inconsistent with the plaintiff's title to be relieved.

Before concluding, I think it right to read two other documents in evidence, one a letter of the 25th of October, 1853, from Mr. Quilter to Mr. Whidborne, in these terms:—

“ 25th October, 1853.

“ Dear Sir,—I send, on other side, copy of a letter, which I have this day received from Mr. A. G. Pooley, in which he offers to sell his proof of 23,433*l.* 11*s.* 2*d.* on the estate of Hennet at and for the sum of 7000*l.*, about 6*s.* in the pound, provided he receives

all above 8s.; if you think his proposition worth your accepting on similar terms with those of G. Hudson, come to town  
 \*346 \*with 2500*l.*, and telegraph early to-morrow whether and when I am to expect you. Cannar and I have abandoned all idea of coming into Devonshire this week.

“I am, &c.,

“J. Whidborne, Esq.

W. QUILTER.”

The other, a paper signed by Messrs. Whidborne and Quilter in November, 1853, which is thus worded :—

“London, 15th November, 1853.

“This is to declare that the undersigned John Whidborne of Teignmouth, in the county of Devon, and William Quilter, of 57 Coleman Street, London, have entered upon and embarked in the following transactions and conditions hereafter stated, that is to say: We have purchased on joint account the respective debts proved under the estate of George Hennet, a bankrupt by George Hudson, M. P., and A. G. Pooley, and it is agreed that the said John Whidborne finds the purchase-money for the same as set forth in the several assignments, and is to be allowed interest thereon after the rate of 5 per cent per annum during the time he is under advance; and finally, upon the result being ascertained, the profit or loss shall be divided into moieties, and the same either be paid or received by the said J. Whidborne accordingly. We have also purchased further debts under the said estate of G. Hennet, proved by William Thorne, William Russell, and James Warwick Woolridge respectively, which are also on joint account, in equal proportions, the several purchase-moneys for which has been provided by us equally, and we are consequently entitled to share all dividends arising therefrom according to the conditions set forth in the several assignments.

“Dated this 15th day of November, 1853.

“J. WHIDBORNE,

“W. QUILTER.”

\*347 \*The document relates of course, among other things, to the first of the purchases now in question, nor will I abstain from expressing the great surprise and great regret which I have felt, that a solicitor of the Court (especially one who had

been the bankrupt's solicitor) and an assignee in bankruptcy (especially one who had been an agent of the bankrupt) should have permitted themselves to engage in transactions such as those which the paper records. I think myself bound judicially to express my strong disapprobation of them. Mr. Quilter, who is not of the legal profession as Mr. Whidborne is, says in a letter to the plaintiff's solicitor of the 21st of July, 1856, "Had the transaction turned out a disadvantageous one for the purchasers (which was not improbable when it was entered into) I should of course have had to bear one-half of the loss. But I am nevertheless advised, that so far as my interest in it is concerned, the profits which it has happened to produce do not belong to me, but to the estate. Having been so advised, I have felt it my duty at once to communicate the facts to the official assignee, and to offer to account for every farthing of the gain arising from my share of the transaction. This would have been done much earlier, or rather I should never have been concerned in the transaction, had I been the least aware of the state of the law on the subject. But until I consulted counsel, in consequence of your letter, I really did not know how it stood."

Some may think this alleged ignorance of law a palliation. Men may, however, be honest without being lawyers, and there are doings from which instinct, without learning, may make them recoil. That Mr. Quilter will give, if he has not given, up to the estate in the bankruptcy or otherwise all his gains, if any, from the other operations mentioned in the paper of the 15th of

\* November, and will at his own costs retire from this \* 348 assigneeship, if he has not already done so, I take, of course, for granted; but, long connected as I have been with the administration of justice in bankruptcy, I will add a recommendation to him, in the event of his appointment to any other assigneeship, to pause before accepting it, and if he shall accept it, and be then a member of a firm of accountants, not to be tempted into allowing the firm to be paid accountants in the bankruptcy, even though with a determination to give up the emolument to the estate, as I suppose in the present instance has been done.

The purchases now in dispute must be set aside, and the dividends received be refunded with interest. But Messrs. Whidborne and Quilter, and the assignees of Mr. Brunskill, will be allowed, with interest, the purchase-money paid on the three transactions.

All the defendants must be charged with the plaintiff's costs of the appeal, as well as his other costs of the suit.<sup>1</sup> The Court has not power to do more in this cause.

THE LORD JUSTICE TURNER.—This is an appeal from a decree of the Vice-Chancellor Sir RICHARD KINDERSLEY. My learned brother has gone so fully through the facts of the case that it would be quite a waste of time to recapitulate them. The decree dismissed the bill with costs as against the defendants, the executors of Brunskill, who was concerned in the first of these transactions, and also as against the defendant Whidborne, who was concerned in all the transactions, so far as the bill sought to affect his beneficial interest under the assignment and agreements, which my learned brother has referred to, and then the decree proceeded to direct an issue, whether at the time when the

\* 349 \* plaintiff executed the assignment on the 1st of November, 1853, of the dividend of 8s. in the pound upon the debt proved, or to be proved, under the commission, whether at that time the plaintiff Alexander Gopsell Pooley believed, or had sufficient reason to believe, that the defendant Quilter was beneficially interested in the purchase of the dividends assigned by that indenture; and like issues were directed as to the purchases under the agreement of April, 1854, and under the agreement of May, 1854.

The decree treats these purchases as valid, so far as the interests of Brunskill and Whidborne are concerned, and makes the plaintiff's title to relief, as to the defendant Quilter's share in the purchases, dependent upon whether the plaintiff, at the time when the purchases were completed, believed, or, to adopt the language of the issues, had sufficient reason to believe, that the defendant Quilter was beneficially interested in the purchases.

After giving this case very full and anxious consideration, I find myself unable to agree with either of the views thus taken by the decree. The title of the defendants Whidborne and the executors of Brunskill is derived through the medium and by the instrumentality of the defendant Quilter. He was the agent through whom they purchased, and they must, as it seems to me, be affected by his acts and conduct. If the purchases are invalidated as to him

<sup>1</sup> See 2 Dan. Ch. Pr. (4th Am. ed.) 1490.

by reason of his acts and conduct, they must, I think, be equally invalidated as to the other defendants. No rule is better settled than that even innocent parties cannot support a title founded upon the fraud of others.

The whole question, therefore, as I now view it, is how the case stands as between the plaintiff and the defendant Quilter. This defendant is an assignee under \* the bankruptcy. It \* 350 was admitted on his part that he could not hold the purchases for his own benefit, but it was insisted by him and by the other assignees that his purchases enured for the benefit of the estate, and several cases decided by Lord ELDON were cited in support of that position. It does not appear, however, that in any of those cases there was any claim on the part of the creditors from whom the purchase was made, and the cases therefore established no more than this, that, where the creditor from whom the debt is purchased does not claim, the estate takes the benefit of the purchase.

The question we have to decide is, how the matter stands where the creditor does claim. How it would stand in a fair open *bond fide* purchase by an assignee without any fraud or concealment, it is not, I think, for the reasons which I shall presently give, necessary for us in this case to decide, but I have no hesitation in stating, that, in my opinion, the purchase could not even in such a case be upheld for the benefit of the estate. I think it is against the policy of the bankrupt law to permit such transactions. Assignees of bankrupts are, indeed, entrusted with great powers, but they have also important duties to discharge. They are trustees for all the creditors, bound to divide the estate equally between them. Are they to be permitted to speculate for the benefit of some to the prejudice of others? If they can purchase one debt, of course they may purchase all the debts. Suppose, then, the case of all the debts purchased by the assignees, and the estate more than sufficient to pay the purchase-moneys. It is admitted that the assignees could not hold the surplus. Is it according to the policy of the bankrupt laws that the surplus thus derived by purchase of the debts of the creditors should go to the bankrupt? I apprehend most clearly not. What the bankrupt laws contemplate is a division of all the estate \* among \* 351 the creditors, and not an acquisition of property by the bankrupt through the medium of purchases from them.

I think, therefore, that these purchases could not have been supported even if they had been made fairly or openly and without fraud or concealment. But what is the case before us? Not only was the defendant Quilter assignee under the bankruptcy, but his partner Ball was the accountant, and Whidborne, his co-contractor, had been the bankrupt's solicitor. These parties, therefore, had full means of knowing the state of the bankrupt's assets, the amount of his debts, the probable amount of the dividends, and the probable times when the dividends would be made. At least it was the duty of the defendant Quilter to give the plaintiff full information as to all these particulars, for whatever else may be said of dealings between trustee and *cestuis que trustent*, this at all events is clear, that a trustee cannot maintain a purchase from his *cestui que trust* unless he has put him upon an equal footing.

Now, did the defendant Quilter give the plaintiff this information? All that I find stated in the answer and the evidence upon that subject is this: that he was ready and willing to give, and did give, to the creditors, and particularly to the plaintiff, all the information in his power upon the subject of the estate of the bankrupt, but not one word is said as to the time, or any information given as to the time, when the dividends would be likely to be paid, which was a most essential element in these purchases, more especially in the first of them. Yet it was upon the defendants to allege and prove a case upon which these purchases could be supported. Something was said in the course of the argument upon the

nature of the trust reposed in the assignees, but Lord ELDON \* 352 has \* said in many cases, and, as I humbly conceive, most

truly said, that the rules of the Court which apply to ordinary trustees apply with still greater force to assignees. What the defendants mainly relied upon, however, was this, that the plaintiff knew that the defendant Quilter was beneficially interested in these purchases, and that, with that knowledge, he had confirmed them, or, at all events, the first purchase. I have looked, therefore, with some care into the evidence upon this subject, the proof of which plainly rests upon the defendants; and so far from the evidence supporting this allegation on the part of the defendants, it seems to me to lead directly to the opposite conclusion. That the plaintiff originally offered to sell his debt to the defendant Quilter, I see no reason to doubt; but when we come to the purchases in question we find this upon the evidence, that the

defendant Quilter had told the plaintiff that he knew of a person who would purchase the debt. We then find in the plaintiff's letter to Quilter offering to sell, which it is to be observed was written at the suggestion of Quilter, no mention is made of Quilter becoming a purchaser; and that neither in the assignment nor in either of the agreements is Quilter's name in any manner referred to. If these were honest purchases on the part of the defendants Quilter and Whidborne, all I can say upon the subject is, that they have been most unfortunately carried out.

In my judgment, assuming the question of knowledge pointed at by the issue to have been material, which I do not think it was, there was no sufficient evidence on the part of the defendants to warrant that part of the decree. I agree, therefore, in what my learned brother has proposed; and I cannot part with this case without observing that I have viewed with the most sincere regret the revival of practices which I had hoped had long been discontinued, and that I sincerely trust this decree may lead to the more pure administration of the estates of bankrupts, and to the entire extinction of the system of trafficking in debts, which is disgraceful alike to the law of the country and to the parties who are concerned in it.

I may add my extreme surprise at finding that the partner of the defendant Quilter, one of the assignees, is the accountant under this bankruptcy, my surprise also at the very large sum, scarcely less than 1600*l.*, which has been paid to the accountant out of this estate.

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#### FOX v. HILL.

1858. March 26. Before the LORDS JUSTICES.

Where a defendant at law to an action on a promissory note pleaded that it was given for a wagering debt, and filed a bill to have it delivered up and to restrain the action on the same ground, but the answer denied the allegation in the bill: *Held*, that he was not entitled to retain an injunction which he had obtained before the answer was filed.<sup>1</sup>

*Quare*, whether, under the present practice, an injunction ought to be granted for want of answer.<sup>2</sup>

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<sup>1</sup> See Kerr Inj. 15, 33, 630; 2 Dan. Ch. Pr. (4th Am. ed.) 1625.

<sup>2</sup> See Kerr Inj. 29.

THIS was an appeal from an order of the Master of the Rolls, granting an injunction to restrain proceedings in an action at law, and from his Honor's subsequent refusal to dissolve the injunction so granted.

The bill sought the delivery up of an assignment, and of a promissory note to be cancelled, and to restrain proceedings at law on both instruments, and the negotiation of the promissory note, on the ground that these securities were given in consideration of money lost by gaming or wagering upon horse-racing.

The writ in the action was served on February 4th; declaration was delivered on the 25th. On the 11th of March the defendant at law pleaded to the action, and on the same day filed the bill in the present suit. The plea impeached the securities on exactly the same grounds as the bill. On the 15th of March interrogatories to the bill were delivered.

\* 354 \* On the 17th of March a motion for an injunction was made, and an affidavit filed on the 16th of March by the defendant in equity was read. It stated in effect that the securities in question were given for an actual advance of money, and that it formed no part of the agreement that the money lost as mentioned in the bill should be paid out of the advance, and that in fact it was not then payable, the settling day, according to the rules of the turf, not having arrived.

The case, however, was not argued, the counsel for the defendant, as they stated on the appeal, understanding the practice followed by the Master of the Rolls to have been settled in such cases by *Senior v. Pritchard*, (a) *Lovell v. Galloway*, (b) to the effect, that however completely a plaintiff's case may be displaced by affidavit, still, if he has filed interrogatories, the Court will not, before answer, go into the merits of the case at all, but will grant an injunction. They however stated, that Mr. Hill would file his answer on the following day, and that they would then move to have the injunction dissolved.

On the first motion day after the answer was filed, a motion was made on behalf of the defendant to dissolve the injunction, but the Master of the Rolls refused the application with costs, whereupon the defendant appealed from both orders.

(a) 16 Beav. 473.

(b) 17 Beav. 1.

*Mr. Selwyn* and *Mr. Hobhouse*, for the appellant.—In the first place, the rule of practice introduced in *Senior v. Pritchard* and followed in *Lovell v. Galloway*, is erroneous. The correct view of the change made in the old practice of granting common injunctions was \*taken by Vice-Chancellor KINDERSLEY \* 355 in *Magnay v. Mines Royal Company*. (a) The evil of the old practice lay in the temptation to file a bill for the mere sake of delay; an evil which will not be abated in the least degree by requiring the bill to be supported by affidavit, for a plaintiff will in most cases swear to the truth of his own case as stated by himself. The intention of the Legislature was to remove this cause of complaint, by allowing the propriety of the injunction to be discussed before it issued. The rule adopted at the Rolls, in fact, is an aggravation of the old mischief because a defendant has not now the benefit of the eight days which were allowed him under the former practice. In this very case the common injunction would not, from the celerity with which the answer was filed, have been obtained at all. For these reasons the first order was wrong. *A fortiori* the second order was wrong. It had all the vices of the first order, and others of its own. For if, according to the decisions at the Rolls already referred to, the injunction ought to issue as of course, if moved for after interrogatories filed and before answer; and if, according to what we consider to have been the decision in this case, the defendant has no right to move to dissolve when his answer is filed, it follows that in every case in which the plaintiff can move before the answer is filed, as he always can, and as he did in this case, he may, by carefully delaying to deliver his interrogatories, obtain an injunction, which the defendant cannot have dissolved until the hearing of the cause.

*Mr. Roundell Palmer* and *Mr. Langworthy*, for the plaintiff.—It is a mistake to suppose that either of the orders under appeal was made in consequence of any rule of \*practice \* 356 merely. The merits of the case were fully considered on each occasion, and the decisions are in accordance with them.

*Mr. Selwyn*, in reply.

(a) 3 Drew. 130.

[ 283 ]

THE LORD JUSTICE KNIGHT BRUCE. — I would rather not give any opinion upon the first order, as it does not appear necessary to do so. The application upon which the second order was made was a motion to dissolve the injunction granted by the first; an application made after the filing of the answer, an answer the sufficiency of which is not denied, and which was filed within the prescribed time, but was not on the file when the first order was pronounced. I confess that if the case had come before us originally, on the second application, I should have been for dissolving the injunction, if for no other reason, at least because the action raised but one question, which was a question of fact; that alleged fact being the single ground on which the bill was filed. I think that the action should be allowed to proceed.

THE LORD JUSTICE TURNER. — I also think that this injunction should be dissolved. Either the security is void or it is not void. If it is void the plaintiff has no occasion to come to equity at all for an injunction against the proceedings at law. If, on the other hand, it is not void, he has no equity to maintain his bill.

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\* 357 \*In the Matter of The NORTHUMBERLAND AND DURHAM DISTRICT BANKING COMPANY

and

In the Matter of The JOINT-STOCK BANKING COMPANIES ACT, 1857.

1858. March 19, 20, 24, 25, 29. April 19. Before the LORDS JUSTICES.

A joint-stock banking company constituted under 7 Geo. 4, c. 46, became insolvent, and in November, 1857, stopped payment, but no resolution was passed for dissolving it. In the following month it was registered under the Joint-stock Banking Companies Act, 1857, in pursuance of a resolution come to after the stoppage. *Held*, by the Lord Justice TURNER, *dissentiente* the Lord Justice KNIGHT BRUCE, that the registration was valid, for that in order to bring a company within the 6th section of the Act, it is not necessary that it should continue to carry on business up to the time of its registration. The registrar's certificate is not conclusive as to the provisions of the Act being applicable to a company.

Consideration of the circumstances which will induce the Court to prefer a compulsory winding up of a company to a voluntary winding up.

THIS was an appeal by certain creditors of the Northumberland and Durham District Banking Company from an order of Vice-Chancellor KINDERSLEY, approving of a voluntary winding-up of the company.

The company was formed by a deed of settlement dated 1st July, 1836, by the first clause of which it was provided, that "the several persons, parties to these presents, all of whom are distinguished by the title of proprietors, and the several other persons who, for the time being, shall become and be proprietors of shares in the capital of the company, shall constitute and form an association, or public joint-stock banking copartnership, to be called, and shall be and are called, 'The Northumberland and Durham District Banking Company,' and that they, the parties, shall and will from time to time, so long as they shall continue and remain members thereof, promote the interests of the company, and the said company \*shall have continuance until the same \* 358 shall be dissolved under or in pursuance of the provisions in that behalf hereinafter contained." The capital was to consist of 500,000*l.*, divided into 50,000 shares of 10*l.* each, with power to increase the capital by additional shares.

The 102d clause provided, that if losses to a certain extent therein specified should occur, the directors should call a special general meeting of the shareholders, and, upon the amount of loss being established, the chairman should, if required by a majority of the meeting, declare the company dissolved, and the company should stand and be dissolved accordingly to all intents and purposes, except for the purpose of winding up and settling its affairs. Except this clause there was not in the deed any thing authorizing or contemplating a dissolution of the company.

Some time after the establishment of the company the capital was increased by the addition of 10,000, and afterwards of 6775, new shares of 10*l.* each. The whole of the capital, with a trifling exception, was paid up.

On the 26th of November, 1857, the company stopped payment. On the 22d of December, Mr. Bourne, a shareholder, presented a petition for winding up the company under the Joint-stock Companies Winding-up Acts, 1847 and 1849. On the 26th of December a meeting of shareholders was held for the purpose of considering whether the company should not be registered under the Joint-stock Companies Act, 1857, and a resolution was passed

that it should. It was registered accordingly on the 30th of December, 1857.

On the 22d of January, 1858, a meeting of shareholders \* 359 \* was held, and it being found that the circumstances had occurred which were necessary in order to bring the 102d clause of the deed of settlement into operation, resolutions were passed that the chairman should declare the company dissolved, and that it should be dissolved accordingly, subject to the provisions of the deed of settlement and of the Joint-stock Banking Companies Act, 1857, and that the company should be wound up voluntarily under the Joint-stock Banking Companies Act, 1857. Liquidators were appointed and various provisions made as to their powers, which were the subject of much comment; but as the judgment of the Lords Justices in no way proceeded upon them, it is needless further to refer to them. The chairman thereupon declared the company dissolved, subject to the provisions of the deed of settlement and of the Joint-stock Banking Companies Act, 1857.

On the 29th of January, 1858, Mr. Bourne's petition was withdrawn.

On the 28th of January, George Milner, a contributory, and W. J. Cookson, a creditor of the company, presented a petition, intituled in the matter of the Joint-stock Banking Companies Act, 1857, and in the matter of the company, praying that an order absolute might be made for winding up the company, by the Court, under the provisions of the Joint-stock Banking Companies Act, 1857, and that all actions and suits against the company might be restrained, or that the voluntary winding-up might be allowed to continue, subject to the supervision of the Court, with liberty for any creditor or contributory of the company to apply to the Court.

The appellants, who were three creditors of the company, and two of whom had, before the registration, commenced \* 360 \* actions for the recovery of their debts, appeared on the hearing of the petition, and contended that the voluntary winding-up ought not to be allowed to continue. A very large majority, however, as to amount, of the creditors, preferred the voluntary winding-up to a compulsory one. On the 17th of February, 1858, Vice-Chancellor KINDERSLEY, made the following order:—

"This Court doth order that so much of the said petition as prays that an order absolute may be made for winding up the said company by the Court, under the provisions of the Joint-stock Banking Companies Act, 1857, do stand over; and this Court doth approve of the voluntary winding-up of the Northumberland and Durham District Banking Company in the petition mentioned, and doth order that such voluntary winding-up do continue. But the liquidators under the said voluntary winding-up are not to act under the 17th section of the Joint-stock Companies Act, 1857, nor to compromise or compound any claim against any shareholder or representative of a shareholder, either in respect of any call or debt, without the leave of this Court, nor to compromise the debt of any other person to the amount of 2000*l.* or upwards, without the leave of this Court; and it is ordered that the costs of the petitioners, and of the said banking company, of this application, be paid out of the estate of the said company. And the creditors, contributories and liquidators, and all other parties interested, are to be at liberty to apply to the Court as they may be advised."

From this order the present appeal was brought.

*Mr. Glasse* and *Mr. W. D. Lewis*, for the appellants.—We submit, firstly, that this company had under the circumstances no power to register itself under the Joint-stock Banking Companies Act, 1857. Banking companies \* formed under 8 Vict. c. \* 361 113, or under 10 Vict. c. 75, are by this Act compelled to be registered under it. The present company was not formed under either of those Acts, but under 7 Geo. 4, c. 46; its registration, therefore, was not imperative, and whether it could be registered must depend on the question whether it came within the terms of sect. 6 (a) of the Act. We contend that, on a fair

(a) 20 & 21 Vict. c. 49, § 6, "Any banking company consisting of seven or more persons, having a capital of fixed amount, and divided into shares also of fixed amount, legally carrying on the business of banking previously to the passing of this Act, and not being a company hereby required to be registered, may, at any time hereafter, with the assent of a majority of such of its shareholders as may have been present in person, or, in cases where proxies are allowed by the regulations of the company, by proxy, at some general meeting summoned for the purpose, register itself as a company other than a limited company under this Act, and when so registered all such provisions contained in any Act of Parliament, letters-patent or deed of settlement constituting or regulating the company, as are inconsistent with the Joint-stock Companies Acts,

interpretation, this section only applies to companies which at the time of registration are actually carrying on the business of banking. The preamble to the Act states its object to be "to amend the law relating to copartnerships and companies carrying on the business of banking, and hereinafter included under the term 'banking companies,'" language which clearly points to companies actually carrying on business. The heading to the class of sections (sects. 3-10), which includes the 6th section, is, "registration of existing banking companies," which must refer to companies existing as banking companies at the time of registration.

\* 362 Then, as to the language of the sections itself, companies to be registered \* under it must be, firstly,

"banking companies," which *prima facie* means companies carrying on the business of banking. This company was not doing so, having ceased to carry on any banking operations long before its registration. Next, it must be a company "having a capital of fixed amount," which this company was not, having lost all its capital. The concluding part of the section clearly points to companies in actual operation, and points to the time of registration as the period when, to bring themselves within the Act, they must be so, and this agrees with the general scope of the Act, which is, to regulate the carrying on the business of such companies. The words "consisting of more than seven members" evidently must refer to the time of registration. We submit, then, that this company, which at the time of registration was not a company existing for the purpose of banking, but merely retained a qualified existence for the purpose of being wound up, and had no capital, was not entitled to be registered; and if it was not, the mere ministerial act of the registrar in giving a certificate of registration cannot bring it within the Act. The Court will not, unless obliged, adopt a construction of the Act which would enable this insolvent body effectually to do an act materially interfering with the remedies of their creditors. If the Court is with us on this point the order appealed from must be reversed, for the provisions as to voluntary winding-up contained in the 102d and following sections of the Joint-stock Companies Act, 1856, have no

1856, 1857, or with this Act, shall no longer apply to the company so registered, but such registration shall not take away or affect any powers previously enjoyed by such company of banking, issuing notes payable on demand, or of doing any other thing."

application to this company unless it comes within the Joint-stock Banking Companies Act, 1857.

Supposing, however, that the Court is against us on the question whether the company comes within the Act so as to make a voluntary winding-up possible, still we contend that a compulsory winding-up is in such a case \* preferable to a voluntary \* 363 one. Sects. 73-81 of the Joint-stock Companies Act, 1856, which apply to a compulsory winding-up, but not to a voluntary one, give most important powers and remedies. A fraudulent preference cannot be touched under a voluntary winding-up. Again, payment of calls made under the 82d section can be summarily enforced. Calls made under a voluntary winding-up can only be recovered by an action. Then, under sect. 16 of the Joint-stock Companies Act, 1857, the liquidators under a voluntary winding-up may make compromises with the concurrence of the shareholders summoned under sect. 18; but, under a compulsory winding-up, the sanction of the Court and notice to creditors are required. Lastly, sects. 11 and 12 of the last-mentioned Act, in the case of a compulsory winding-up, authorize the arrest of a shareholder about to abscond, a remedy which does not exist under a voluntary winding-up, and which is most valuable in a case like the present, where the liabilities are enormous and are not unlikely to fall so heavily on particular shareholders as to induce them to abscond. That a number of the largest creditors prefer a voluntary winding-up is not conclusive, and the Court ought not to be much influenced by it, the legislature not having thought fit to give the majority a power of binding the minority as to the choice of proceedings. We submit, therefore, that if the case be within the Act, an order for a compulsory winding-up by the Court ought to be made.

*Mr. Bailey* and *Mr. Giffard*, for Messrs. Milner and Cookson; *Mr. Anderson* and *Mr. T. C. Thompson*, for the Sunderland creditors of the company; and *Mr. Toller* and *Mr. Thring*, for the company, in support of the order of the Vice-Chancellor.—We submit that, under the 115th section of the Joint-stock Companies Act, 1856, the certificate of registration \* is con- \* 364 clusive. If, however, the question is open, we contend that the registration was effectual. The appellants say it is against the policy of the law to interfere with the rights of creditors, but

this is no reason for straining the construction of the Act. If the legislature meant to interfere with them, they must be interfered with. Then, as to the bank having stopped payment before it was registered, if the registration had been effected the day before the company stopped payment, the question as to the invalidity of the registration could not have been raised, though the rights of the creditors would have been just as much interfered with. There is, therefore, nothing substantial in the argument on the score of public policy. Moreover the Act really does not place creditors in a worse position ; in some respects it places them in a better, and the policy of the legislature was, to enable a voluntary winding-up, in order to avoid the frightful expense which was generally incurred under the old Winding-up Acts. The question, then, simply is, whether on a fair construction of the Act the case comes within it. The preamble of the Act, even if taken alone and construed strictly, does not necessarily bear the construction the appellants put upon it, and it is far too vague to control any thing that is reasonably clear in the enacting part. "Existing banking companies," as regards the 4th section, clearly means existing when the Act passed, and under that section this company, had it been formed under either of the Acts there mentioned, must have been registered, and the having stopped payment could not have taken away the obligation to register, the terms of the Act being express ; it is, therefore, a mere accident if the registration now under consideration is invalid. This company satisfied all the requisitions of the 6th section. It was a company, for no steps

had been taken to dissolve it under the provisions of the \* 365 deed of settlement, nor had it been dissolved by \* Act of law or any order of a competent Court. It might only exist for a particular purpose, and not for that of carrying on business, still it was a company. *Taylor v. Stray*, (a) *Fletcher v. Crosbie*, (b) *Davidson v. Cooper*, (c) *Ex parte Phillips*, *In re London and Westminster Insurance Company*. (d) It was a banking company, for it had been established solely for the purposes of banking, and had up to and after the passing of the Act carried on that business, and that only ; and, therefore, so long as it was a company at all, it was a banking company. If not, what was it ?

(a) 2 C. B. N. S. 175 ; 3 Jur. N. S. 540.

(b) 9 M. & W. 252.

(d) 3 De G. & S. 3.

(c) 11 M. & W. 778.

It was a company having a capital of fixed amount, for those words must be taken as referring to the constitution of the company, not to its state at the time of registration. The words at the close of the section do not exclude a company which has stopped payment. The mere insertion of some permissive words applicable only to companies which are continuing their business does not shut out other companies included in the previous part of the clause. The Act had for its object, not only the management of continuing banking companies, but the better winding-up of those which are incapable of carrying on business, and it is most consistent with the general scope of the Act that the present company should be held included in it.

As to whether a compulsory winding-up should be ordered, we submit that the preference of the vast majority of creditors for a voluntary winding-up ought to be considered by the Court almost conclusive as to that being the better course. The question is not one of law, but of a discretion which creditors, having regard to their own interests, are in a position to exercise more advantageously \* than the Court can do. No argument has \* 366 been urged against a voluntary winding-up which would not apply in every case of a joint-stock company, yet the legislature clearly contemplates a voluntary winding-up as a thing not to be discouraged.

*Mr. Selwyn*, for the liquidators.

*Mr. Glasse*, in reply, referred to *Roe v. Fuller. (a)*

At the close of the argument their Lordships reserved judgment till the first Monday in Easter term, desiring that, in the mean time, the liquidators would make a report, showing (1) the state of the assets ; (2) what had been collected ; (3) what was expected to be collected, and (4) within what time ; (5) the liabilities of the company, secured and unsecured ; and (6) the scheme according to which the liquidators proposed to wind up the company. Their Lordships were accordingly furnished with a report made by Mr. Coleman, an accountant employed by the liquidators to investigate the affairs of the company. Mr. Coleman commenced by saying :

\* (a) 7 Exch. 220; 21 L. J. N. S., Exch. 104.

"In reporting to you the result of my investigation and examination into the affairs of the Northumberland and Durham District Banking Company, I must observe, that the extremely limited time (viz., eight days) that I have been engaged in the same would in itself preclude the possibility of entering into such details as I consider an affair of this importance demands; but, in addition to this, I may observe, that the irregular, imperfect, and vague mode in which the books of the establishment have been kept, and the utter ignorance in which the clerks were also kept as to the most important portion of the business, namely, the bills of exchange

\* 367 and \* debts on loans, have tended very much to increase the difficulties of ascertaining that information which was absolutely necessary to guide my judgment in arriving at or estimating the value of the assets."

He then proceeded to state the liabilities of the bank, which amounted to the sum of 2,255,200*l.*, without taking into account interest on deposits and on other debts. He then gave tabular statements showing the number and amount of the debts under 50*l.*, under 100*l.*, and above 100*l.*, whether on deposits or current accounts. He found that creditors to the amount of about 160,000*l.* were secured, but that the securities were not likely to leave a surplus. He then proceeded to the state of the assets, which, exclusive of the Derwent iron works, he estimated at 1,064,082*l.* He also found that the Derwent iron company were indebted to the bank in 753,166*l.* on account current, and that the liabilities on bills discounted for the Derwent iron company amounted to 194,756*l.*, making a total of debt and liability in respect of that company of 947,922*l.* He then gave his reasons for saying that the value of the iron works could not at present be estimated. He found the amount of cash now standing to the credit of the liquidators to be 77,857*l.* 9*s.* 10*d.*, and went on to say, "so much latitude has been allowed by the bank to their customers, that the advances made and which are now due are extremely disproportionate to the immediate means of the debtors; indeed, viewing the assets *en masse*, and considering that they are all in this kingdom, they require more judgment and time in realization than any like matters which ever came under my notice." He then gave his estimate of the securities held by the bank, amounting to 412,138*l.*, and stated that, in estimating the realization of the assets, it was extremely difficult to fix a definite period, especially

with reference to the portions which consisted of collieries and the Derwent iron company's debt. He arrived at \* the \* 368 result, that the total liabilities were 2,255,200*l.*; the assets, exclusive of what the Derwent iron works would yield, 1,064,082*l.*, leaving a deficiency of, 1,191,118*l.*, subject to reductions by what should be received from the Derwent iron works. He then observed, "I have noticed some transactions of the directors between the time of suspension and the appointment of liquidators that will require special investigation and rectification, for, as they now stand, they are preferences detrimental to the general creditors." He went on to say, that it was evident that *pro rata* contributions levied on the shares would not meet the amount required unless some few of the shareholders were sufficiently wealthy to bear the brunt of the deficiency of the majority. He also remarked, that it would be necessary to institute an examination into the proceedings and transactions of the bank since 1847, so as to show clearly in what manner and by what means the present disastrous result had occurred. The liquidators also made a report, which they concluded by saying: "In conclusion we respectfully beg leave to propose, first, that an order for compulsory winding up should now be pronounced, adopting all proceedings up to this time, or all excepting our appointment, we being perfectly willing to retire from the office of liquidators if the Court should think it desirable; secondly, that a large call should at once be made and enforced, unless the shareholders make some proposition acceptable to the creditors, and so guaranteed as to be rendered safe of accomplishment, in time as well as amount; thirdly, that the sanction of the court and of the creditors be at once given to settling with creditors under 50*l.*, and also under 100*l.*; fourthly, that the limitation in the order of KINDERSLEY, Vice-Chancellor, as to compromises with debtors should be altered."

April 19.

\* The Lord Justice TURNER, after stating the prayer of \* 369 the petition by Messrs. Milner and Cookson, the order of the Vice-Chancellor, and the nature of the appeal, proceeded as follows:—

The appeal involves two questions: first, whether any order ought to have been made upon this petition; secondly, if any

ought to have been made, whether it ought not to have been an order for winding up the company by the Court under the provisions of the Joint-stock Banking Companies Act, 1857.

The first of these questions, whether any order ought to have been made, depends upon whether the company was properly subject to the provisions of the Joint-stock Banking Company's Act, 1857, for this petition was not intituled in the general Winding-up Acts, but only in the Joint-stock Companies Banking Act, 1857, and therefore as the petition then stood, unless the case fell within that Act, there was no jurisdiction to make the order, whatever might have been done by means of allowing the petition to be amended. Now, there is no dispute as to the facts upon which this question depends. The company was formed in July, 1836, under the Act 7 Geo. 4, c. 46; it stopped payment on the 26th of November, 1857; on the 26th of December, 1857, there was a meeting of the shareholders, at which it was resolved to register the company under the Joint-stock Banking Companies Act, 1857, and on the 30th of December, 1857, it was registered accordingly. The question is whether this registration brings the company within the provisions of that Act, and consequently of the Joint-stock Companies Acts, 1856-57, which are incorporated with that Act.

It is to be observed, in the first place, that this is not a company which was required by the Joint-stock Banking \* 370 \* Companies Act to be registered, for it was not a company formed either under 8 Vict. c. 113, or under 10 Vict. c. 75, and it is of companies formed under those Acts only that the legislature has made it imperative that there should be a registration. If, however, this company, though not required to be registered under the provisions of the Act, was authorized to be so registered, there can, I think, be no doubt that it must be governed by that Act, though it is singular that there does not occur in the Act any express provision that companies so registered shall be subject to the provisions either of the Act itself or of the Acts incorporated with it. I think, however, that it must become subject to them in this way. By the 2d section of the Joint-stock Companies Act, 1856, banking companies and insurance companies were excluded from the operation of the Act. The 3d section of the Joint-stock Banking Companies Act, 1857, repealed that exclusion as to banking companies. By the effect of that repeal therefore, if the matter had rested there, banking companies would be

subject to the Joint-stock Companies Act, 1856; but by sect. 18, it is provided, that "the Joint-stock Companies Acts, 1856 and 1857, shall not apply to any banking company legally carrying on the business of banking previously to the passing of this Act, and not hereby required to be registered, until such time as such company registers itself under this Act in pursuance of the power hereby given in that behalf;" so that it is not to become subject to the provisions of the Act until it registers; and from that, I think, the inference is necessary, that when it does register, it does become subject to the provisions of the Joint-stock Companies Acts of 1856 and 1857. The 11th section confirms this view, for it enacts, that "the following Acts shall not apply" (and it then enumerates several Acts) "to companies registered under this Act or under the Acts incorporated herewith, or either of them; \* and \* 371 all companies so registered shall be wound up in manner directed by the said incorporated Acts." Therefore it is clear, that no company registered under the Joint-stock Banking Companies Act, 1857, could be wound up otherwise than under the provisions of the Joint-stock Companies Acts, 1856 and 1857.

I may here notice an argument which was urged on the part of some of the respondents, that we have nothing to do with the question whether this company was authorized to be registered or not; that it was sufficient that the company was in fact registered, and that the certificate of registration is, by the 115th section of the Joint-stock Companies Act, 1856, rendered conclusive. I notice this argument only for the purpose of laying it entirely out of the case. If this company was not authorized to be registered, I take it to be quite clear that the certificate of registration can be of no avail.

The question therefore is, whether under the circumstances which I have mentioned of this company having stopped payment in November, 1857, it could be validly registered under the Act in December, 1857, after the stoppage. This depends, I think, on the 6th section of the Act. [His Lordship read the section.] There are here four several requisites to registration under the Act; the company to be registered must be a banking company, whatever that may mean; next, it must be a company having a capital of fixed amount, and divided into shares of fixed amount: it must be a company which legally carried on the business of banking previously to the passing of the Act; and there must be the

resolution of the shareholders which the section requires. As to the two latter of these requisitions there is, in the present case, no dispute ; there was the resolution required, and this company carried on the business of \*banking, not only previously to but at the time of the passing of the Act of Parliament. So that it becomes unnecessary to consider the question, what would have been the effect if there had been a stoppage of the company before the Act passed or came into operation ; and I do not mean to enter into the consideration of that question. What we have to consider here is, whether at the time of the registration this was a “banking company having a capital of fixed amount, and divided into shares, also of fixed amount.”

Now, first, was this body a company at all at the time of the registration ? And if it was a company, was it, within the meaning of this Act, a “banking company” ? That it was a company cannot, I think, be doubted. By the deed of settlement, article 1, it is provided : [His Lordship here read the clause.] Then, by article 102 of the deed, the dissolution of the company is provided for in the event of the guarantee fund having been exhausted, and of its having lost one-fourth of its capital, and a meeting having been called of the shareholders, and those shareholders having passed a resolution that the company shall be dissolved. Now no such meeting as is mentioned in this article had been held at the time of the registration, and the company, therefore, then subsisted undissolved. It is difficult, I think, to say that, if it subsisted as a company, it could subsist otherwise than as a banking company ; but still the question whether it subsisted as a banking company, not in the general sense which may be attached to those words, but within the meaning of the Joint-stock Banking Companies Act, 1857, must depend upon the sense in which the words “banking company” are used in the 6th section of that Act, whether they are used as descriptive of the general character of the com-

panies to be affected by the Act, or as indicative of the character which the companies to be affected \*by the Act are to fill at the time when the registration takes place. The case before us, I think, resolves itself into that point, and, upon the best consideration which I have been able to give to the subject, I think that the words “banking company,” in this Act, are used in the former and not in the latter sense. The words “banking company” are used not merely in this section, but also in

other sections of the Act. They are used in this particular section with reference to companies legally carrying on the business of banking previously to the passing of this Act, without any express reference to the business being carried on at the time of the registration. They are used in the 12th section with reference to companies to be formed hereafter; they are used in the 4th section with reference to companies formed under the Acts which are there referred to, of the 8th Vict. and of the 10th Vict. Now suppose that one of the companies referred to in that 4th section — a company formed under the 8th or 10th Vict. — had stopped payment after the passing of the Act, but before the 1st of January, 1858 (the day on or before which companies falling within that section were required to be registered), it could not, I think, have been held that that company was not bound to register, notwithstanding the stoppage, because the enactment is express that all companies formed under either of those Acts shall register on before the 1st January, 1858. But the company could not be so bound unless it was a banking company within the meaning of the Act, although it had ceased to carry on business. We have here, therefore, a case in which a company having ceased to carry on the business of banking would, nevertheless, be included in the term "banking company;" and I do not see my way to put a different or a less extended construction upon the words "banking company" in the 6th section than that which, in my judgment, they necessarily bear in the 4th section. Taking, therefore, this case \* upon \* 374 the language of the Act, so far as respects "banking companies," I think that at the time of this registration this company, though it had stopped payment, was a "banking company" within the meaning of the Act. Then was it a company having a capital of fixed amount, and divided into shares of fixed amount? I am of opinion that it was, for I think these words are also descriptive of the constitution of the company, and do not refer to its state and condition at the time of registration. This is plainly what was intended by the legislature, for whatever might be said with reference to the first member of the sentence, "having a capital of fixed amount," as importing that there was to be that capital of fixed amount at the time when the registration was made, the other member of the sentence, "divided into shares of fixed amount," must be determined by the constitution of the company, and not by its condition at the time of registration, and if one member of

the sentence thus refers to the original constitution of the company, I think the other member of the same sentence ought also to be so referred. It is argued for the appellants that the latter part of the 6th section, which says, "but such registration shall not take away or affect any powers previously enjoyed by such company, of banking, issuing notes payable on demand, or of doing any other thing," shows that the section was intended to apply only to companies actually carrying on business. But the answer to this argument is, that though no doubt the section does apply to companies actually and actively carrying on business at the time of the registration, it does not follow that it does not also apply to others which may at the time of the registration have suspended their payments, and as to which it might in many cases be equally important, and indeed necessary, to preserve their powers. The

\* 375      appellants also relied on the language of the recital in the Act, "whereas it is expedient to amend the laws relating \* to copartnerships and companies carrying on the business of banking, and hereinafter included under the term 'banking companies,'" and upon the heading of the sections of the Act, subsequent to the 2d, which is "registration of existing banking companies." The appellants say that this heading shows that the Act was to apply only to existing banking companies, and that these words, "carrying on the business of banking," in the recital, show that the legislature contemplated only companies actively carrying on that business. But the heading of this 3d section plainly refers to the time of the passing of the Act: it has nothing whatever to do with the time of registration, and that argument therefore is of no avail. With reference to the argument derived from the recital, I think it would be a strained and narrow construction, if a possible construction, of this Act, to limit the words "banking company," in the operative parts of the Act, to companies actually carrying on business, by force merely of so loosely worded a recital, even if the recital necessarily bore the construction which is contended for on the part of the appellants. But it does not seem to me that the recital does necessarily bear that construction. The recital is, "It is expedient to amend the laws relating to copartnership and companies carrying on the business of banking, and hereinafter included under the term banking companies." There are two constructions which may be put upon these words; either they mean copartnerships and companies carrying on the business of bank-

ing, and which are hereinafter included under the term "banking companies," or they may mean copartnerships and companies carrying on the business of banking, and other copartnerships and companies, hereinafter included under the term "banking companies." If the former be the meaning—if it means copartnerships and companies carrying on the business of banking, and which copartnerships and companies \*are hereinafter \* 376 included under the term "banking companies"—the fact of companies carrying on the business being included would import no negative upon other companies being included also. And if it means the latter, *i.e.*, co-partnerships and companies carrying on the business of banking, and other copartnerships and companies hereinafter included under the term "banking companies," then the words "banking companies" are left wholly unexplained, and must take their construction from the other parts of the Act, and from the ordinary interpretation attached to the words themselves. It seems to me, therefore, that the recital does not carry out the argument which was deduced from it on the part of the appellants.

The point, however, which was most relied on, on the part of the appellants, was the change which the registration operates in the position of the creditors, and no doubt the position of creditors is in some respects changed, but the change in their position is by no means so great as it was represented to be on the part of the appellants; for if this case be not within the Joint-stock Banking Companies Act, 1857, it would, in any event, be within the Winding-up Acts of 1848 and 1849; and then, if within those Acts, it would be within the Winding-up Amendment Act, 20 & 21 Vict. c. 78. If, then, the creditors are not met by the Joint-stock Banking Companies Act, 1857, they are met by the Winding-up Amendment Act, 20 & 21 Vict. c. 78, which varies the position of the creditors scarcely, if at all, less than the Acts which we are now considering. I find the same powers given by the one Act as by the other of enabling the Court to enjoin creditors from proceeding with their actions at law, and in many respects the Acts have the same operation. Indeed in some respects the Acts which we are considering, the Joint-stock Banking \* Companies Act, and \* 377 the Acts incorporated with it, seem to me to extend the remedies, or, at least, may well be thought to extend the remedies of creditors. To whatever extent, however, the position of the

creditors is changed, it is changed by the legislature; and if changed as to companies actually carrying on business at the time of registration, I do not see my way to say that it was not intended to be changed as to other companies which at that time had suspended payment. The scope and purpose of these Acts seem to me to furnish additional reasons for holding this company to have come within them, for they are not Acts passed solely for the purpose of regulating the management of the business of continuing companies, but they were passed also for the purpose of providing better remedies for the winding up of companies; and it does not follow that because a company may not be a continuing company, and may not therefore require resort to those provisions of the Acts which apply to the management of a continuing business, it therefore cannot have been intended to be included in the Acts; for it may require resort to the regulations of the Acts for the purpose of being wound up under the provisions which apply to winding up. Upon the whole, therefore, my opinion is that this case falls within the Joint-stock Banking Companies Act, 1857, and that the Court therefore had power to make the order which has been made in this case.

The question then arises, whether the proper order to have been made by the Court on this occasion was an order for the compulsory winding-up of the company by the Court, or the order which was in fact made, an order to continue the voluntary winding-up of the company. [His Lordship then stated concisely the effect of the reports made by Mr. Coleman and the liquidators, and proceeded as follows:]

\* 378 \* In this state of things there can be no doubt whatever that, whether it was or was not proper in the first instance to order a compulsory winding-up of the company, it is now proper and necessary that such an order should be made, because, upon the face of the report, we have before us this,—that there have been preferences made by the directors, and that there are transactions requiring investigation; and there are powers given in the case of a compulsory winding-up, which are not given to liquidators under a voluntary winding-up. It appears, too, that there are very large calls which must necessarily be made, and I do not find any provisions in the Act by which the liquidators, under a voluntary winding-up, have any power to proceed for the recovery of those calls otherwise than by action, whereas better and more

available powers exist for the purpose of enforcing those calls under a compulsory winding-up. I have no doubt, therefore, that there must now be an order for winding up this company by the Court, and it is immaterial therefore to consider whether we should have concurred in the order which was made by the Vice-Chancellor, if the facts, as presented to us, had been the same as were presented to him. But as this case goes very much into the marrow of cases of this description, I think it may be right to state the view which, speaking for myself, I have taken in considering the question, whether there should be a voluntary or a compulsory winding-up. I think that in cases of this enormous magnitude, where such vast interests are at stake, where the most ample powers which the law has given must be required to be exercised; where there have been transactions justifying, if not requiring, investigation; where it may be doubtful whether the property of the shareholders will answer the liabilities; where there is danger to the creditors of the shareholders escaping from their liabilities,—in all such cases my very clear and decided opinion is, that \* having \* 379 regard to the powers which may be put in force under a winding-up by the Court, and which cannot be exercised in the case of a voluntary winding-up, a winding-up by the Court ought to be preferred to a voluntary winding-up; and I think that the legislature, not having thought proper to provide that the majority of creditors should have the power to bind the minority in the choice of proceedings (a provision which, though introduced into the Bankrupt Acts, has not been introduced into this Act), I should not be disposed to give any decided weight to the opinion of the majority of the creditors against the minority upon the question as to the choice of proceedings, without being fully satisfied not merely by the votes of the majority, but by the facts of the case, that there would be secured to the minority the full dividend which they might obtain if the course of proceeding which they desired was adopted. I make these observations because they possibly may have some importance in future cases; in the present case there is no doubt. In my judgment the order which must now be made must be this: an order for the winding up of this company by the Court, with liberty, if any learned brother thinks fit, to the Judge to whose Court the matter is attached to adopt all or

any of the proceedings under the voluntary winding-up as he may think just.

THE LORD JUSTICE KNIGHT BRUCE.— The meeting at which the registration in question in the present case was resolved on, took place after, and was indeed not summoned or called before the company so registered had stopped payment, had closed its doors, had publicly avowed its insolvency, and had finally ceased to transact business. Of course, therefore, all this had happened before

\* 380 the registration, and that registration was accordingly, in my opinion, an act which, whether \* to be described or not

to be described as fraudulent, was void ; for the 6th section of the Statute of 1857, c. 49, as I read and understand that section, was not intended to apply to any company which, though carrying on business as a banking company at the time of the enactment, should not be likewise doing so at the time of registration. An opposite view of the enactment must necessarily, in my judgment, attribute to the legislature such an amount of carelessness, as, uncomelled, I am unwilling to think possible, and the language of the statute does not, as I conceive, require us to construe it in such a manner. On the contrary, to understand the expression “banking company” in the section as I understand it, appears to me to put a construction of an ordinary and of a strictly correct kind, as well as one *rei gerendæ aptiorem*, on the language used. Thinking the registration here good for nothing, I must hold that this company, or late company, was not properly the subject of what is called a voluntary winding-up. But had I understood the phraseology of the legislature otherwise, I should still have considered the particular circumstances before us as rendering that course inconvenient and inexpedient. So that my learned brother and myself arrive substantially at the same conclusion.

## \* SWINFEN v. SWINFEN.

\* 381

1858. March 16, 18, 25. April 22. Before the LORDS JUSTICES.

During the trial of an issue *devisavit vel non*, the counsel for the heir and the devisee agreed to compromise the case on the terms of the devisee giving up the estate and receiving a life annuity. It was well known to the counsel and attorney of the devisee, that she was opposed to any compromise. At the time when these terms were come to, her arrival in Court was immediately expected, but the heads of agreement were signed and a juror withdrawn before she arrived. The agreement was embodied in a *nisi prius* order. The devisee having refused to comply with its terms, the heir applied to the Court of common law for an order to commit her, which was refused. He then filed a supplemental bill for specific performance of the agreement.

*Held*, that, assuming counsel to have, without express authority, such power to bind their clients by a compromise as to make the agreement good at law,<sup>1</sup> still an agreement made under such circumstances was one of which, in the absence of subsequent acquiescence or confirmation by the devisee, specific performance ought not to be decreed against her.<sup>2</sup>

*Sembles*, the fact that the bill was not filed until the heir had failed in his attempt to enforce the agreement at law would alone have been a bar to specific performance.<sup>3</sup>

<sup>1</sup> This subject was very fully discussed in an action brought by Mrs. Swinfen against Lord Chelmsford, reported 5 H. & N. 890, to recover damages for the injury done her by the compromise.

Counsel employed in the usual way to conduct a suit are not in general invested with authority to enter into a compromise without the sanction of their client. *Holker v. Parker*, 7 Cranch, 436; *Vail v. Jackson*, 15 Vt. 314; *Mayer v. Foulkrod*, 4 Wash. C. C. 511; *Huston v. Mitchell*, 14 Serg. & R. 307; *Dodds v. Dodds*, 9 Penn. St. 315; *Davidson v. Rozier*, 23 Missou. 287; *Abbe v. Rood*, 6 McLean, 106; *Dorwent v. Loomer*, 21 Conn. 245; *Lewis v. Gamage*, 1 Pick. 347, 351, note (1); *Lockhart v. Wyatt*, 10 Ala. 231. But in *Strauss v. Francis*, L. R. 1 Q. B. 379, it was held that it is within the general authority of counsel, retained to conduct a cause, to consent to the withdrawal of a juror, and the compromise being within the counsel's apparent authority is binding on the client notwithstanding he may have dissented, unless the dissent was brought to the knowledge of the opposite party at the time. See also *Prestwich v. Poley*, 18 C. B. N. S. 806; *Swinfen v. Lord Chelmsford*, 5 H. & N. 590; *Swinfen v. Swinfen*, 1 C. B. N. S. 364; 18 C. B. 485; *Potter v. Parsons*, 14 Iowa, 286. The consent of counsel to a decree is to be given upon their own conception of their instructions. 2 Dan. Ch. Pr. (4th Am. ed.) 974.

<sup>2</sup> See 2 Dan. Ch. Pr. (4th Am. ed.) 974, note (4); *Fry Spec. Perf.* (2d Am. ed.) 508, 509.

<sup>3</sup> See 1 Story Eq. Jur. § 737 a.

THIS was an appeal by the plaintiff from a decree of the Master of the Rolls, dismissing a supplemental bill which was filed to enforce an agreement for compromise entered into by the counsel of the parties, on the trial of an issue directed in the cause.

The original bill was filed in 1855, by Frederick Hay Swinfen, the heir-at-law and one of the next of kin of Samuel Swinfen deceased, for the purpose of securing his real and personal estate, while proceedings were being taken to set aside, on the ground of want of testamentary capacity, a will dated the 7th of July, 1854, by which he gave his real and personal property at Swinfen to the defendant Patience Swinfen, his son's widow, and appointed her his executrix. The testator died on the 26th of July, 1854. On the 30th of July, 1855, a motion was made in the cause for a receiver and injunction. The Master of the Rolls declined to grant a receiver, but directed an issue *devisavit vel non*, in which Mrs. Swinfen was to be plaintiff.

The issue came on to be tried at the Stafford assizes, on \* 382 Saturday, the 15th of March, 1856. Mrs. Swinfen \* herself was examined on her own behalf, cross-examined, and re-examined, after which five other witnesses were examined in support of her case. The court then adjourned till Monday, the case of Mrs. Swinfen not having been closed, and none of the three attesting witnesses to the will having been called.

On Saturday evening Mrs. Swinfen's leading counsel, being of opinion that some facts elicited in cross-examination had produced on the minds of the jury an impression very unsavourable to her case, had an interview with her, and recommended an attempt at a compromise. She took time to consider, and returned to her home, at the distance of a few miles. On Sunday she sent to her attorney a telegraphic message "the offer is refused."

On the following morning, before the trial was proceeded with, Mrs. Swinfen's counsel agreed in Court with the counsel for the heir for a compromise. A memorandum of the terms was signed by counsel on both sides, and a juror was withdrawn shortly before Mrs. Swinfen's arrival in Court, which had been all along expected. It was a matter in dispute whether Mrs. Swinfen's attorney authorized the compromise. The counsel and attorney for the heir had no information as to whether her counsel had authority to make it or not. Upon her arrival she expressed to her counsel and attor-

ney her objection to what had been done, but did not make any protest in Court.

The terms of compromise were embodied in a *nisi prius* order afterwards made a rule of Court, which was as follows: That the jury be discharged from giving any verdict in this action upon the following terms, namely, the estate in question in this cause to be conveyed by the \* plaintiff at law to the defendant, in \* 383 fee, free from incumbrances, if any, created since the death of Samuel Swinfen, such conveyance to bear date from the 29th of September, 1855; the defendant to secure to the plaintiff an annuity for the said plaintiff's life on the estate, of the sum of 1000*l.* per annum, inclusive of the sum of 300*l.* per annum already secured to her on the said estate, such annuity also to bear date and be computed from the said 29th of September, 1855. It is also ordered, with the like consent, that if any charge is existing on the estate, created prior to the death of the said Samuel Swinfen, the interest arising thereon is to be borne by the said plaintiff and defendant in equal moieties. It is also ordered, with the like consent, that the costs of the said plaintiff shall be taxed as between attorney and client, and that such costs shall not exceed in amount the sum of 1250*l.*; such costs, when taxed, to be borne and paid by the said defendant. It is likewise ordered, with the like consent, that in the event of any question arising on the above terms, the same be referred to Sir FREDERICK THESIGER and the Attorney-General. It is likewise ordered, with the like consent, that the house and grounds are to be occupied by the said plaintiff, without payment of rent, until the 29th September next. And lastly, it is ordered, with the like consent, that either of the said parties shall be at liberty to move her Majesty's Court of Common Pleas that this order may be made a rule of the said Court."

On the 24th of March, 1856, the plaintiff's solicitors, Messrs. Frere and Cholmeley, wrote to Mr. Charles Simpson, the solicitor of Mrs. Swinfen, a letter, asking for the documents which it would be necessary to lay before counsel to enable him to settle the requisite instruments for carrying out the compromise, and also for an account of Mr. Swinfen's personal estate.

\* On the 27th of March, 1856, the plaintiff's solicitors \* 384 having received no answer, wrote again to Mr. Simpson, calling his attention to the matter. To this letter, also, no answer was returned.

On the 31st of March, 1856, Messrs. Frere & Co. wrote to Mr. Simpson as follows :—

“ Sir,— Swinfen,— We have written to you twice on this subject, and have not been favoured with any reply. We understand from Messrs. Cole, that your client intends, if she can, to evade the performance of the agreement entered into by her for the settlement of the question in dispute. Unless we hear from you satisfactorily, by return of post, we shall assume that such is her intention and yours, and we shall act accordingly.”

On the 1st of April, 1856, Mr. Simpson wrote to Messrs. Frere & Co. as follows :—

“ Gentlemen,— Swinfen deceased,— In reply to yours, received to-day, I should have thought the more natural course would be to assume the due performance of the agreement until you had notice to the contrary, rather than write ‘unless I hear from you, satisfactorily, by return of post, we shall assume that it is your intention to repudiate it, and act accordingly.’ Acting accordingly means further litigation I presume. I might not have received your letter to-day, yet, according to your threat, you would have resumed hostilities to-morrow. I notice your assertion that you understand the intention of Mrs. Swinfen from Messrs. Cole, merely to remark, that I do not believe those gentlemen have given you such information. I have never expressed an intention to resist the agreement, and have received no instructions to do so. I

had no concern in the arrangement of the compromise,  
• 385 • except to object to it, nor had Mrs. Swinfen. It was made against her positive directions, and I have not hesitated to speak of it in the strongest terms of disapprobation. That it was a great wrong on one side or the other is conceded by all whose opinion is worthy of attention. Of course, if Mrs. Swinfen instructs me to resist the course of action on the agreement, and if she should be well-advised to do so, I am at liberty to follow her instructions, and I will, in that case, give you the earliest possible notice; but, in the mean time, I must protest against inventions, and request you to refrain from communicating to me statements imputed to my agents. I do not know who are your agents here,

and, therefore, I have no means of reciprocating this metropolitan recreation."

On the 2d of April, Messrs. Frere & Co. replied as follows:—

" We have received your letter of yesterday, and are extremely sorry that the evasive manner in which you think proper to treat our communications makes it clear that we cannot, with any regard to the interests intrusted to us, continue our endeavour to conduct business with you except under the support of a Court of justice. We must, therefore, proceed as we may be advised to compel you to deal seriously and properly with this matter, and you will recollect that the amount we are to pay for costs is limited, and that further costs, rendered necessary by your misconduct, will fall on your client."

To this letter no answer was returned.

On the 16th of April, 1856, Messrs. Frere, Goodford, & Co. wrote to Mr. Simpson as follows:—

\* " Sir,— *Swinfen v. Swinfen*, — It is probably superfluous, but we think it right, to inform you, that as you have taken no steps to supply us with the information requisite to enable us to proceed to carry out the agreement for settlement of the matter in dispute in this cause, which we requested you on the 24th ult. to furnish us with, counsel is now instructed to prepare a supplemental bill for enforcing the agreement; and we shall seek to throw the costs thereof on your client." \* 386

On the 18th of April, 1856, Mr. Simpson replied as follows:—

" I have received your letter of the 16th, and forwarded it to Mr. John Cole, as I did the preceding one, in which you announced your intention to apply to some Court on some pretext or other. Probably you may be able to correspond with Mr. Cole to a more useful purpose, and with more despatch, than with me. I have referred to your letter of the 24th ult. without being able to discover which mortgage you inquire after."

On the 1st of May, 1856, Mr. Cole wrote to Messrs. Frere & Co. as follows:—

"I have received from Mr. Simpson the views of Mrs. Swinfen on your last letter, so far as regards the arrangement made by counsel at the Stafford assizes, and the substance is, that she is not disposed to carry out the terms thereof, on the ground of the arrangement having been made not only without her sanction, but directly in opposition to her wishes. Under these circumstances, I conclude you will have to bring the matter before the Court in such way as you may be advised."

\* 387 On the 5th of June, 1856, the plaintiff obtained a \* rule for Mrs. Swinfen to show cause why she should not be committed for disobedience to the order of the Common Pleas.

On the 10th of June, 1856, several days after service of the rule, Mrs. Swinfen filed her answer to the amended bill, which had been amended before the trial. By her answer, after setting out an account of what passed at the trial, she proceeded as follows: "The said Frederick Hay Swinfen, although, as I am advised, he is bound, by the said order and the compromise thereby effected as aforesaid, to admit the validity of the said will, and to derive his title to the Swinfen estate from me as the devisee under such will, has, since such order, still affected to dispute the validity of such will, and has insisted upon my putting in my answer to his amended bill in this cause, in which all mention of the said Judge's order and of the compromise is omitted: and in which the plaintiff has still retained all charges of fraud alleged against me with respect to the said testator's will, for the purpose of impeaching the validity thereof. And by the said amended bill, which I am so required to answer, he still continues to pray for an issue to determine the validity of the said will, exactly as if the said order at *Nisi Prius*, of the 12th March, 1856, had not been made, and as if the whole question settled by the said compromise, including the validity of the said will, still remained open; and he has threatened to issue and execute against me an attachment for want of answer, unless I put in my answer to the said amended bill. I believe that he also, in violation of the true intent and meaning of such compromise, intends to proceed with the aforesaid suit in the Prerogative Court, to recall probate of the said will on the alleged ground that such will is invalid, and I believe that he is thereby endeavouring to raise and litigate again both in the said suit in the Prerogative Court, and in this suit,

\*the same question which the said compromise was intended to settle, although I am advised that the matters alleged in the said amended bill, with respect to the alleged circumstances under which the said will of the 7th July, 1854, was executed, have now, by reason of the said compromise, become as irrelevant and improper for the purposes of this suit as they are false in fact. Nevertheless, in order to prevent any prejudice arising to me by my allowing such improper allegations to remain uncontradicted, I say as follows." She then proceeded to give her account of the circumstances under which the will was made.

On the 11th of June, 1856, cause was shown against the rule, and the Court expressed a strong opinion that Mrs. Swinfen must be attached if she refused to obey the order, but they discharged the rule, on the ground that no sufficient proof of a refusal was given. In Michaelmas term the plaintiff obtained a fresh rule, against which cause was shown, and the matter was fully argued on the 24th of November and the 1st and 2d of December, (a) before three Judges. Judgment was given on the 12th of January, 1857, when Mr. Justice CROWDER gave his opinion that an attachment ought not to issue. The other two Judges did not concur in this opinion, but the rule was discharged, on the ground that an attachment ought not to issue unless the Court were unanimous as to its propriety.

The plaintiff then filed his supplemental bill for specific performance of the compromise, alleging that Mrs. Swinfen was, from the first, bound by it; and that even if not, she had acquiesced in it, so as to preclude herself from repudiating it. The Master of the Rolls decided against the plaintiff on both grounds, and on the 10th \*of November, 1857, dismissed the supplemental bill without costs, and directed another issue. The plaintiff appealed.

*Mr. Roundell Palmer* and *Mr. Hobhouse*, for the plaintiff, contended that the compromise was originally binding, especially as Mrs. Swinfen's attorney had been present in Court while it was being made, and had offered no objection. That even if the agreement was not originally binding on Mrs. Swinfen, it must be deemed to have been ratified by her; for that if she intended not to

(a) 1 C. B., N. S. 364.

be bound by it, she ought at once to have repudiated it: whereas, her own conduct, the letters of her attorney, and her answer in chancery, were all such as to lead the plaintiff to suppose that she treated the compromise as valid. They referred to *Furnival v. Bogle*, (a) *Gilfillan v. Brown* (b) *Currie v. Glen*, (c) *Hargrave v. Hargrave*, (d) *Duke of Beaufort v. Neeld*, (e) *Wade v. Stanley*, (g) *Bligh v. Tredgett*. (h)

*Mr. Kennedy* and *Mr. Cole* appeared for the respondent, but the Court, without calling on them, directed the case to stand over till that day week.

March 25.

THE LORD JUSTICE KNIGHT BRUCE.—The question in this appeal is of the title of the appellant, the plaintiff in the cause, to obtain specific performance of the agreement made on the 17th March, 1856, at the Staffordshire assizes, between the eminent lawyers who on that occasion were the leading counsel for him and \* 390 for the respondent, the defendant, Mrs. \* Patience Swinfen, respectively,—a question, as I conceive, depending on the true estimate of her subsequent conduct, for the proposition, that as matters stood when on the day already mentioned the document expressing or recording that agreement was signed by those learned counsel (both now on the bench), or when in consequence the jury impanelled on that occasion were on the same 17th of March discharged without giving a verdict, there was a case for specific performance against her, is one plainly impossible, in my opinion, to be maintained. It is, I think, very clear upon the evidence, that neither before the paper was signed, nor before the discharge of the jury, had Mrs. Patience Swinfen directed, authorized, or sanctioned either of those steps, or the making of any compromise of the issue then under trial. By means of that issue she was, though in form the plaintiff in it, defending herself against the appellant by seeking to establish a right in herself by devise from Mr. Samuel Swinfen, whose heir he is, to a landed estate in fee-simple of considerable value, on part of which estate she was at the

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| (a) 4 Russ. 142.                 | (e) 12 Cl. & Fin. 248. |
| (b) 11 Shaw, Dunlop & Bell, 548. | (g) 1 Jac. & W. 674.   |
| (c) 9 Bell, Murray & Young, 308. | (h) 5 De G. & S. 74.   |
| (d) 12 Beav. 408.                |                        |

time, as I collect, residing, and of the whole of which she then, I believe, was, or claimed to be, as she now is, or claims to be, in the receipt of the rents. That asserted right was the point in trial, in trial on an issue *devisavit vel non* directed by this Court in a suit instituted by the appellant against her; and to barter her case for a life annuity of 700*l.*, or for any other substitute, however valuable, and on that footing, and for that purpose, to abandon the issue without a verdict, was not an act in the ordinary course of business, was not only not an act which, or the like of which, the client had ever instructed her attorney or counsel to do, or could have reasonably supposed to be likely or possible without her personal direction or personal concurrence, but was an act to which she had expressly refused to assent; nor probably can it be out of place \* for the present purpose, to bear in mind that the \* 391 point under trial was one deeply involving her feelings, and very seriously implicating her character for truth and upright dealing.

Enough has, in my opinion, been stated, to show that it would be contrary to the most clearly recognized principles by which Courts of Equity are guided upon questions of specific performance, to decree specific performance here, unless by conduct subsequent to the discharge of the jury, Mrs. Patience Swinfen has so far varied her position as to make the agreement equitably binding on her to that extent.

Now, though it is perhaps true that on some subsequent occasions she expressed or conducted herself in an ambiguous manner, and though certain passages that have been read from the answer sworn and filed by her on the 10th June, 1856, may be deemed fairly open to observation, yet I do not find that she ever represented herself as satisfied with the compromise, nor do I believe that she ever was so in fact, or was at any time after she had heard of it not desirous to be freed from it if possible. The affidavits too of the 5th and 11th June, 1856, in the Court of Common Pleas, and other parts of the evidence, show that the overt acts of herself and her attorney relating to the matter were after the 10th June, 1856, uniformly, and were before that time at least occasionally, such as to show dislike and objection upon her part to the compromise, and her intention not uncomelled to submit to it. Allowance surely should be made for the very unusual position in which she had been placed. Her counsel engaged at the trial were against her, a

phrase which I use of course respectfully towards each of those gentlemen, and with a perfect conviction of their earnest \* 392 anxiety to do their duty, and of the purity and \* honour of their motives and intentions. Her attorney felt himself necessarily checked and hampered. The Court of Common Pleas, or several Judges of that Court, held her to be bound by the order of *nisi prius*, and she had a very narrow escape from imprisonment for not obeying it, nor without Mr. Justice CROWDER's opinion would that probably not have been her condition: independently of which, there seemed room for doubt whether, notwithstanding her dissent, the agreement did not civilly bind her, at least at law. It was exceedingly difficult for her to know how to act, and disbelieving, as I do, that at any time after the making of the agreement, or the discharge of the jury, she, or her attorney, or the conduct of either, deceived or misled the appellant or his solicitors on the subject, I am of opinion that it would be a harsh construction of what she said and did, in the embarrassing circumstances in which she was placed, a construction less than just to her, and more than just to the heir, to hold that she has so acted as to expose herself to the present demand for specific performance. If she became legally bound either at the assizes or afterwards, a point on which I have not meant to express, nor do I intimate, any opinion, she may possibly be liable to an action for damages. But I am satisfied that the appeal before us, grounded as it is on the appellant's supposed title to compel her to perform the agreement specifically, is groundless, and ought to be dismissed with costs; a conclusion not involving or implying an opinion upon my part whether the compromise was, as a dealing merely concerning property, a discreet or an indiscreet arrangement on each or either side. However this may have been, I agree with the Master of the Rolls that the issue *devisavit vel non* must be tried, the validity of the alleged will as to real estate being disputed.

\* 393 \* I have been assuming that if the appellant had had a title to specific performance independently of the proceedings taken by him after March, 1856, in the Court of Common Pleas, those proceedings would not, either on the ground of election, or otherwise, have destroyed that title. I desire, however, to say, that I am not sure that they would not have done so.

The appellant's learned counsel suggested that the trial, if any, ought to take place elsewhere than in the county of Stafford. We

have not, I think, materials sufficient to enable us to decide that point. It is competent to either of the parties to make an application at the rolls on the subject. The same learned counsel also suggested that a receiver ought to be appointed. I do not see any sufficient ground at present for such a step. Stress was laid on the delay that has taken place, or time that has passed, since March, 1856. I must, however (without giving any opinion what, if any, persons or person were or was to blame for the failure or misadventure at Stafford), say, that to the appellant or his advisers must be attributable the circumstance that the issue was not afterwards tried in the course of that same year. It was, moreover, argued, that the appellant (failing the compromise) was entitled to the costs of the ineffectual and unfinished trial. This point should, I think, be open, if it is not open, for determination in the cause, after the trial which is to take place; nor do I see any objection to declaring now expressly, if either party so desires, that the point is to be considered open: with reference to which, however, it may be right to recollect, that the respondent must have sustained costs in the Court of Common Pleas, and that it might, perhaps, have been quite as well before discharging the jury to ascertain her personal wishes on the subject of selling her claim.

\* THE LORD JUSTICE TURNER. — It is not, in my judgment, \* 394 necessary for us in this case to give any opinion upon the general question as to the power of counsel or attorneys to bind their clients by agreements entered into by them, and upon that question, therefore, I give no opinion. Assuming such agreements to be binding upon clients, I think that if the agreements are of such a nature that recourse must be had to this Court, exercising its ordinary jurisdiction, for the purpose of enforcing them, this Court must be guided by its ordinary rules and principles in determining whether it will enforce them or not. Attending to those rules and principles, I am of opinion, that the agreement in question in this suit ought not to be specifically enforced. Independently of other grounds, I think there was too much both of pressure and surprise upon the defendant to warrant this Court in enforcing it. That she would not herself have entered into the agreement, seems to me, upon the evidence before us, to be perfectly clear;

but she was placed in circumstances in which it was impossible to determine the agency either of her counsel or of her solicitor. To enforce the agreement against her would be to give effect to the pressure of circumstances, which she could not by any means control. Again, she had protested against any such agreement being made, and her protest was known both to her counsel and to her solicitor. Surely then it cannot be viewed otherwise than as a surprise upon her that the agreement was concluded without her having had the opportunity of further considering it. That it was intended and entered into with a view to her benefit cannot be doubted, but she had not the opportunity of judging whether she would agree to it.

\* 395 It was much urged on the part of the plaintiff that \* the conduct of the defendant since the trial furnished ground for specifically enforcing this agreement ; but I can find no trace of her having ever assented to the agreement, unless she can be considered to have done so by the equivocal passages which were read from the answer ; and, looking to the circumstances under which the answer was filed, and the proceedings at law which were then pending against the defendant, I think it would be wrong to treat those passages as entitling the plaintiff to relief to which he would not otherwise have been entitled. To do so would be to give an effect to an attempt on his part to enforce the performance of an agreement which, in the judgment of this Court, ought not to be performed. It was further urged on the part of the plaintiff, that there was no fault on his part or on the part of his advisers, and that he could not be restored to the position in which he stood before the agreement was entered into ; but I do not think that, under the circumstances of this case, we should be warranted in enforcing this agreement upon that ground. So far as the plaintiff is damned if he may seek his remedy, if any, at law. Upon these grounds, my opinion is, that this appeal must be dismissed, and dismissed with costs.

*Mr. Kennedy* then urged that the decree ought to be varied in the respondent's favour by altering the order of dismissal without costs into a dismissal with costs ; and the case was adjourned that the point might be argued.

April 22.

*Mr. Kennedy*, for the defendant.—The memorandum signed by counsel was not intended to be an agreement; the object was to obtain an order at common law, and the present is an attempt to enforce, \* not an agreement, but an order made \* 396 at *nisi prius*. There is no precedent for this; but supposing the document to be an agreement, it was *ultra vires*. Attorney and counsel have authority to bind their client by all acts done in the regular course of business, but this was not one, their business being to conduct a suit, not to compromise it; and the case must be determined by the ordinary law of principal and agent, as applied to cases where an agent is acting beyond the scope of his general authority. Mrs. Swinfen gave no authority to effect a compromise, and the agreement was not binding on her. It is said, that she was bound to repudiate the act of her counsel within a short time, and *Furnival v. Bogle* (a) was referred to as showing this. But that case has no application. Where an order of Court is made with the unauthorized consent of counsel, it is reasonable that the client should be bound to impeach it within a short time; but here the question is, whether the alleged agreement is to be enforced in equity. *Furnival v. Bogle* might apply if we were seeking to set aside at law the order made at *nisi prius*. Mere silence does not in general ratify an unauthorized contract. *Hawtayne v. Bourne*. (b) Mrs. Swinfen's silence might have been a ratification had she been present while the arrangement was being made, but she was not. There has never been any acquiescence on her part; she distinctly repudiated the agreement on the 28th of March, and it is impossible that the plaintiff or his advisers can have been misled. The language in her answer in chancery, which has been much relied on, is quite natural, if it be borne in mind that the plaintiff was at one and the same time compelling her to put in an answer, and endeavouring to enforce the order for compromise, which, if upheld, made the answer unnecessary.

\* The answer itself shows that she was determined to resist \* 397 the compromise as far as the law would allow her. The plaintiff's case wholly fails. The filing this supplemental bill was an unreasonable, unconscientious, and oppressive step, and it ought to be dismissed with costs.

(a) 4 Russ. 142.

(b) 7 M. & W. 595.

[ 315 ]

*Mr. Hobhouse*, in reply.—The opinion of the Judges of the Common Pleas was, that there was a contract valid at law, though they declined to enforce it by attachment. It having been held, that there was a legal right, which a Court of Law would not enforce, there was nothing unreasonable in applying to a Court of Equity; and the Judges intimated that such an application would be proper. Mrs. Swinfen's answer was calculated to mislead us, and her whole conduct since the trial has been a course of double dealing on the subject. The argument, that the proper mode of enforcing the contract was in equity, and not by the summary process of attachment, weighed with the Judges and inclined them to refuse an attachment. In no part of the transaction have the plaintiff and his advisers been to blame; he has been put to useless expense by the first trial, having entered into a compromise with persons whose authority he had no reason for doubting; and it would be a hardship for him to pay the costs of proceedings into which he has been led without any fault of his own.

THE LORD JUSTICE KNIGHT BRUCE.—The plaintiff's claim to be excused from payment of the defendant's costs of the supplemental suit can only be maintained on the ground that he was misled by the conduct of the defendant, or had some plausible ground for instituting it. I have already stated my opinion, \* 398 that \* neither the plaintiff nor any of his advisers was misled by the defendant's conduct. Was there then any plausible ground for instituting the suit? Possibly all chance of success was taken away by the double application to the Court of Common Pleas. And after the notice which the plaintiff received of the defendant's objections to the compromise, I believe that he cannot have been advised by any practitioner in this Court that he had any probability of success in a suit for specific performance. I think that the supplemental bill was a hopeless measure, and I am not for refusing to the respondent the costs of the supplemental suit.

THE LORD JUSTICE TURNER.—How the case would have stood as to costs, if the supplemental bill had been filed on the faith of the correspondence with Mr. Simpson, or of Mrs. Swinfen's answer in the original suit, it is unnecessary to say, for, beyond all doubt, the affidavits filed in the Common Pleas in November, 1856, three

months before the filing of the bill, had put the plaintiff in full possession of the fact that the defendant did not intend to treat herself as bound by the compromise. What ground, then, is there for saying that the plaintiff, who filed his bill with full knowledge that the defendant disputed the validity of the compromise of which specific performance was sought, should be exempted from payment of costs? It has been urged that the Judges of the Court of Common Pleas held that there was a concluded agreement, but I do not find that they said so, still less, that they said that there was an agreement which a Court of Equity would enforce. I am of opinion, therefore, that the supplemental bill ought to have been dismissed with costs.

## \* HEATHER v. O'NEIL.

## \* 399

1858. March 4, 8, 9, 10. April 24. Before the Lord Chancellor Lord CHELMSFORD and the LORDS JUSTICES.

Lands of a wife were settled to such uses as she and her husband should appoint and subject thereto to the use of the husband for life, with remainder to the wife for life, with remainder to the children of the marriage. Two days afterwards the husband and wife, in exercise of the power, appointed the lands to the use of trustees upon such trusts as the husband alone should appoint, and subject thereto in trust for the husband for his life, or till his bankruptcy, with remainder in trust for the wife for life, and after her death on the trusts declared by the former deed. Some months afterwards the husband executed a mortgage, reciting merely an agreement for a loan, and thereby appointed that the trustees should hold the lands upon trusts for sale, and securing the repayment of the mortgage money, and subject thereto upon trust for the husband and his heirs. *Held*, by the Lord Chancellor and Lord Justice TURNER, *dissentiente* Lord Justice KNIGHT BRUCE, that the equity of redemption was effectually resettled, and belonged to the husband in fee.

THIS was the appeal of the plaintiff from the decision of the Master of the Rolls, dismissing with costs a bill which sought to have effect given to a limitation of the equity of redemption in a mortgage deed.

In 1817, the property in question in the cause stood limited, subject to a life-estate in Ann Armstrong in part of the property,

to the use of her four daughters as tenants in common in tail. One of these daughters married William Edward Heather.

At the time of the marriage of Mr. and Mrs. Heather there was no settlement, nor any agreement for a settlement, but on the 23d and 24th of November, 1817, a post-nuptial settlement was made by indentures of lease and release, the latter being a deed to lead the uses of a recovery which was afterwards suffered. These uses were declared to be as to that portion of the lands in which Ann Armstrong had a life-estate to her use for life, and as to all the lands and hereditaments (subject to this life-estate in a part) to the use of such persons and for such estates as William Edward Heather and Mary Ann his wife should jointly by deed appoint,

and in default of appointment to the use of William  
• 400 Edward \* Heather for life, with remainder to the use of  
Mary Ann for her life, with remainder to the use of their  
children as they should jointly appoint. In default of appoint-  
ment, the limitation was to the use of the children and their heirs  
as tenants in common.

Two days after the date of this settlement, viz., on the 26th of November, 1817, by a deed-poll executed by William Edward Heather and his wife, with the requisite formalities, they jointly appointed that the lands and hereditaments should stand limited to the use of Christopher Hunter and Isaac Cox and their heirs upon trust for such persons and for such estates and interests, and in such manner as William Edward Heather should by deed appoint, and, in default of appointment, upon trust, in case William Edward Heather should at any time during the life of his wife become bankrupt or insolvent, or should fail in business, or should suffer his lands or goods to be taken in execution and to be sold, to pay the rents and profits to Mrs. Heather, or as she should appoint; and, until William Edward Heather should become bankrupt or insolvent, or suffer execution of his goods or lands, to permit him to receive the rents and profits during his life, and, after his death, to permit Mrs. Heather to receive the rents and profits for her life, and, after the death of the survivor, the trustees, Hunter & Cox, were to stand seised of the premises (of which no appointment should have been made) upon the trusts of the deed of the 24th of November, 1817.

On the 25th of March, 1818, Mr. Heather executed an indenture

of appointment and release, on which the question in the cause turned.

It was made between himself, of the first part, Hunter & Cox, the trustees in the deed of the 26th of November, \* 1817, of the second part, Thomas Staples and John \* 401 Cotton Wheeler of the third part, and John Murch of the fourth part.

It recited the original will and the devolution of the title to Mrs. Heather and her marriage with Mr. Heather. The only other recitals were the following: "And whereas by indenture of lease and release, bearing date respectively the 23d and 24th days of November last, the release between Ann Armstrong of the first part, the said William Edward Heather and Mary Ann his wife, of the second part, William Dean, gentleman, of the third part, John Jenkins, gentleman, of the fourth part, and John Morgan, Esq., and the said William Dean of the fifth part, and by a common recovery agreed to be suffered in pursuance thereof in or of Michaelmas term now last past: and a deed-poll or appointment bearing date the 26th day of November last, the hereditaments hereinafter particularly mentioned and described were limited and now stand settled and assured to the only and absolute use and behoof of the said Christopher Hunter and Isaac Cox, their heirs and assigns, for ever, upon the trusts, and to and for the ends, intents, and purposes, and subject to the provisos and conditions hereinafter declared or expressed concerning the same, that is to say, upon trust for such person or persons, for such estate or estates, and for such interest or interests, and in such parts, shares, and proportions, and upon such trusts, and to and for such ends, intents, and purposes, and with, under, and subject to such powers, provisos, declarations, and agreements, and in such manner and form, as the said William Edward Heather at any time thereafter, and from time to time, by any deed or deeds, instrument or instruments in writing, either absolutely or conditionally, and with or without power of revocation \* and new appointment, to be by him sealed and \* 402 delivered in the presence of and attested by two or more credible witnesses, should direct, limit, or appoint the same, with such remainders over in default of appointment as in the said indentures are expressed. And whereas the said William Edward Heather hath applied to and requested the said Thomas Staples and John Cotton Wheeler to lend and advance the sum of 340*l.* on the

security of the said one-fourth part of the said money and the hereditaments and premises hereinafter particularly described, and it hath been agreed that the said premises shall be conveyed to the said John Murch upon the trusts hereinafter expressed." By the operative part it was witnessed that, in consideration of 340*l.* to William Edward Heather paid by Thomas Staples and John Cotton Wheeler, and also in consideration of the sum of 10*s.* to Isaac Cox, Christopher Hunter, and William Edward Heather paid by John Murch, William Edward Heather, by virtue and in exercise and execution of the power and authority to him given and reserved in and by the thereinbefore mentioned deed-poll, and of all and every other power and powers, authority and authorities in him vested, or in any wise enabling him in this behalf, with the consent, approbation, direction, and appointment of Thomas Staples and John Cotton Wheeler, testified by their being made parties thereto, and executing thereof, directed, limited, appointed, granted, bargained, sold, released, and conveyed, and Christopher Hunter and Isaac Cox, at the request and by and with the consent, direction, approbation, and appointment of William Edward Heather, granted, bargained, sold, aliened, and released the said fourth part or share comprised in the preceding deeds unto John Murch, his heirs and assigns, for ever, upon the trusts and to and for the ends, intents,

and purposes thereinafter expressed, upon trust that Murch,  
\* 403 his heirs, executors, administrators, \* and assigns respectively, should, in case the said William Edward Heather, his executors, administrators, or assigns, should make default in payment of the 340*l.* and interest to Staples and Wheeler on the 24th June then next, that Murch, at the request of Staples and Wheeler, should sell and dispose of the one-fourth part, and pay Staples and Wheeler the 340*l.* and interest, and pay the residue of the moneys to Heather; and in case any part of the hereditaments should remain unsold, then to release and assign the same to Heather, his heirs and assigns, or as he should direct and appoint.

The principal question in the cause was whether this deed was merely a mortgage so as to leave the ultimate uses of the deed of the 24th of November, 1817, unaffected, or whether it ought to be regarded as a resettlement of the lands. The plaintiff, who claimed under Mr. Heather, insisted on the latter as the true construction and effect of the deed. The defendants, who claimed under Mrs. Heather, contended for the former construction.

The Master of the Rolls, considering that the deeds of 1817 and 1818 all formed part of one transaction, decided in favour of the defendants. The plaintiff appealed.

*Mr. R. Palmer* and *Mr. W. D. Lewis*, for the appellant.—The deed of March 25th, 1818, is not a mere mortgage. It is in terms a resettlement. The uses declared by the deed of the 24th of November, 1817, subject to the power therein contained, were wholly displaced by the deed of the 26th of November, executing that power. Under the latter deed the husband alone had power completely to declare the trusts affecting the property.

\* In construing, therefore, the deed of March, 1818, any \* 404 intention of the wife is out of the case, and the only question is, what was the intention of the husband on executing that instrument. This circumstance distinguishes the present case from those which were relied upon on behalf of the defendants in the Court below, and in which the property being, irrespectively of the mortgage, the property of the wife, an inadvertent relimitation of the equity of redemption has been held not to prejudice her.

They referred to, and commented upon, *Ruscombe v. Hare*, (a) *Reeve v. Hicks*, (b) *Barnett v. Wilson*, (c) *Fitzgerald v. Fauconberge*, (d) *Whitbread v. Smith*, (e) *Eddleston v. Collins*, (g) *Anson v. Lee*, (h) *Hipkin v. Wilson*, (i) *Plowden v. Hyde*, (k) *Sugden on Powers*. (l)

*Mr. Lloyd* and *Mr. Smythe*, for the respondent.—The burden of proving an intention to change the devolution of the property by the terms of a proviso for redemption is thrown upon the persons who contend for the change. Thus, in *Innes v. Jackson* (m) it was held, that where a tenant in fee mortgages in fee, and reserves the equity of redemption to himself and the heirs of his body, his estate

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| (a) 6 Dow. 1.                                     | (c) 2 Y. & C. C. C. 407. |
| (b) 2 Sim. & St. 403.                             |                          |
| (d) Fitzgibbon, 207; 6 Bro. P. C. 295 (Toml. ed.) |                          |
| (e) 3 De G., M. & G. 727 [Am. ed. note (1)].      |                          |
| (g) 3 De G., M. & G. 1; 10 Hare, 99.              |                          |
| (h) 4 Sim. 364.                                   | (i) 3 De G. & S. 738.    |
| (k) 2 De G., M. & G. 684 [Am. ed. note (2)].      |                          |
| (l) Pages 282, 360, 366, 367 (6th ed.).           |                          |
| (m) 16 Ves. 356.                                  |                          |

will be regarded as fee-simple and not as an estate tail. In *Ruscombe v. Hare* (*a*) a wife's land was mortgaged with a reservation of the equity of redemption in favour of the husband and his heirs,

and, in the absence of any further evidence of an intention

\* 405 to \* alter the devolution of the estate, it was held, that the estate, subject to the mortgage, belonged to the wife and her heirs. In *Whitbread v. Smith* (*b*) real estate was settled on

a husband for life, remainder to his wife for life, remainder to the heirs of the body of the wife, remainder to the heirs of the husband. The husband and wife barred the estate tail, and resettled the

estate to such uses as the husband should appoint. On the next day the husband appointed the estate, giving a joint power to himself and wife, with limitations in favour of themselves and their family in default of appointment. On the 2d of July, the husband and wife appointed the estate, by way of mortgage, for a term, to cease on payment. On a subsequent day a second mortgage was made. There were transfers of these mortgages, and, ultimately, in a transfer of July, 1842, there was a proviso for reconveyance to the husband, his heirs, and assignis, or as he should direct. Under these circumstances, Vice-Chancellor KINDERSLEY held, that, looking at the whole transaction, the ordinary presumption was rebutted, and that a sufficient indication appeared of an intention to change the devolution of the estate, but the full Court of

appeal reversed the decision. The plaintiff, therefore, must show upon the face of the deeds a plain intention to resettle, which is here nowhere apparent. There is no recital in the deed of the 24th of November, 1817, that shows the slightest intention to dis-

turb the limitations then subsisting beyond the alteration made by that deed, the uses declared by which are the ordinary limitations to the husband and wife for their lives, with remainder to their children. Moreover, the deed contains a power to Mr. Heather,

and after his death to Mrs. Heather, to lease any part of the property for a term not exceeding twenty-one years; also a power to

sell or exchange any part of the estate with the sanction,

\* 406 \* in writing, of Mr. and Mrs. Heather, or the survivor of them, and to purchase new estates, to be held on the same trusts as were contained in the said indenture. These powers and provisions go strongly to rebut the presumption of an intention on

the part of the wife to resettle and alienate her property by the deed, which was substantially contemporaneous; viz. that of the 26th of November, 1817. After making such careful provisions, the wife cannot be presumed to have intended to yield up to her husband, absolutely, all her estate and interest in the property. Nor is there in the last-mentioned deed any recital of an intention to change the trusts of the settlement of the 24th. The next deed is the mortgage of the 25th of March, 1818, to Staples and Wheeler, under which the plaintiff claims, dated four months after the marriage settlement. This deed must be taken to have formed part of the arrangement in pursuance of which the preceding instruments were executed. It contains no recital of an intention to change or resettle the estate; and in reciting the deed of November 25th, it does not proceed beyond the mere power. All that the plaintiff relies upon is the proviso for reconveyance to Mr. Heather and his heirs, upon payment off of the mortgage, which consists of mere general words of limitation, and, according to the authorities upon the subject, is insufficient to show an intention to resettle the estate.

They referred (in addition, to several of the cases already mentioned, as having been commented on by the counsel for the appellant), to *Reeve v. Hicks*, (a) *Anson v. Lee*, (b) *Sacheverel v. Frogate*, (c) *Jackson v. Parker*, (d) *Co. Litt.*, (e) *Cholmondeley v. Clinton*, (g) *Clark v. Burgh*. (h) The other arguments relied upon appear sufficiently from the judgments.

*Mr. Roundell Palmer* replied.

Judgment reserved.

April 24.

THE LORD CHANCELLOR.—This is an appeal from the decree of the Master of the Rolls dismissing the plaintiff's bill with costs.

The plaintiff claims, as eldest son and heir of George Heather, who was brother and heir of William Edward Heather, the undivided fourth part of certain lands and hereditaments in the parish

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| (a) 2 Sim. & St. 403. | (e) Page 47 a.     |
| (b) 4 Sim. 364.       | (g) 2 Jac. & W. 1. |
| (c) 1 Vent. 161.      | (h) 2 Coll. 221.   |
| (d) Amb. 687.         |                    |

of Hollingbourne Allington or Thurnham Fittenden and Bristead, in the county of Kent.

And the question is, whether these lands, which were originally the property of Mary Ann Heather, the wife of William Henry Heather, now belong to the heir of the husband or to the heir of the wife.

Before the year 1817, the lands in question stood limited as to part to Ann Armstrong, the mother of Mrs. Heather, for life, with remainder to her four daughters, as tenants in common in tail, and as to the residue, to the four daughters as tenants in tail in possession.

With respect to the one-fourth of which Mrs. Heather  
 \* 408 \* was tenant in tail in possession, the plaintiff is barred by the Statute of Limitations, as William Edward Heather died in 1829, and upon his death, his widow continued in possession, and the bill of the plaintiff claiming as the heir of the husband, was not filed till the 30th of May, 1856, long after twenty years of uninterrupted possession had passed.

The case then is confined to the other portion of the land, which is of small value, and in which Mrs. Armstrong had the life-estate, which terminated at her death in 1843.

At the time of the marriage of Mr. and Mrs. Heather, there was no settlement nor any agreement for a settlement, but on the 23d and 24th of November, 1817, a post-nuptial settlement was made by indentures of lease and release. [His Lordship stated the effect of the settlement as above set out.] Two days after this settlement, viz., on the 26th of November, 1817, by a deed-poll executed by: [His Lordship stated the effect of the deed as above set out.] It was probably not anticipated that the power given by this deed would have been exercised by Heather beyond what was necessary to enable him to raise money by mortgage, but the immediate operation of it was to substitute for the joint appointment in the deed of the 24th of November, 1817, an appointment by him alone, giving him thereby an unlimited power over the estate. On the 25th of March, 1818, Heather executed the indenture of appointment and release, on which, in my judgment, the question entirely turns. It was made between: [His Lordship stated the effect of the deed as above set out.]

Now upon this deed the question arises whether it amounts  
 \* 409 to any thing more than the creation of a security, \* by

Heather, leaving the ultimate uses of the deed of the 24th of November, 1817, unaffected and subsisting, or whether it is not to be regarded as a resettlement of the lands to new uses.

There are circumstances in the case which create a desire to struggle against a construction which will carry away the estate originally belonging to the wife to the heir of the husband. I have already intimated that if it were permitted to me to speculate upon what was in the contemplation of the parties at the time when the deed-poll of the 26th of November, 1817, was made, nothing seems to be more probable than that Mrs. Heather never meant to give her husband an absolute power of defeating the uses of the settlement, but merely intended to facilitate his means of raising money by way of mortgage. The question, however, arises not upon the deed conferring the power, but upon the exercise of it by the deed of the 25th of March, 1818.

Did, then, Heather, by this deed, intend to leave the previous settlement untouched, except so far as was necessary to create a security, or did he intend to change the ulterior uses and to raise entirely new ones?

In stating the question as one of intention it is obvious that it must be incapable of any fixed principle of solution, because different minds may be differently impressed with the same indications of intention, and each case must therefore depend upon its own peculiar circumstances. As was observed by Lord CRANWORTH, in the case of *Whitbread v. Smith*: (a) "The question to be decided upon each case is more one of fact than of law, for in each case it is to be discovered whether or not there is a sufficient indication of an intention to vary \* the previously \* 410 existing limitations." It is too wide a proposition to assert, as was done in the course of the argument, that this intention is to be collected whenever the reservation of the equity of redemption is inconsistent with the terms of the settlement. This must have been so in all the cases on the subject, otherwise no question could have arisen. It would be more correct to say, that the principle by which a Court of Equity appears to have been guided in cases of mortgages, after settlements with a reservation of the equity of redemption to uses not corresponding with the prior ones,

(a) 3 De G., M. & G. 738.

is to presume against an intention to alter the previous limitations further than is necessary for the purpose of creating the security.

This principle is most strongly exemplified in cases of mortgages of the wife's estate by husband and wife, as in *Ruscombe v. Hare*, (a) where Lord ELDON states the opinion of Lord THURLOW, expressed a quarter of a century before, that where husband and wife mortgage the wife's estate, and the equity of redemption is reserved to the husband and his heirs, without any recital or other evidence of the intention, the husband is seised of the equity of redemption as he before had the legal estate *jure uxoris*.

We obtain here something like a rule, which shows negatively what will not amount to evidence of an intention to change the prior uses, but it is necessarily of very limited application the moment it is admitted that each case must be decided upon its own grounds. And as, according to the corrected opinion of Lord ELDON, in *Innes v. Jackson*, (b) the indications of intention may be collected from the limitations in the deed, without its being necessary that there should be in the recitals of the instru-  
\* 411 \* it is  
ment any expression of the meaning of the parties, \* it is  
obvious that authorities upon the subject are of little service, except where the decisions turn upon the effect of limitations nearly resembling those under consideration.

And such appears to me to be the case of *Fitzgerald v. Lord Fauconberge*. (c) There William Fowler, being seised in fee in the year 1712, settled his estate to the use of himself for life, with various successive remainders in tail, with an ultimate remainder to his heirs, reserving to himself a power of revocation by any writing attested by three witnesses. In the year 1715, Fowler, by indentures of lease and release (attested by two witnesses), reciting that he was indebted to the several persons named in the schedule, conveyed the premises to Tombs and Ward, and their heirs upon trust out of the rents and profits, or by mortgage or sale of the premises, to raise so much as should be sufficient to pay all the debts and sums mentioned in the schedule, and, after payment thereof, to pay the overplus (if any) and reconvey such part of the premises as should remain unsold to him, the said William Fowler, or to such other person and for such uses as he by any deed or writing under his hand and seal, attested by two

witnesses, shouls direct and appoint. A bill was filed by the husband of one of the coheiresses of Mr. Fowler, claiming against Lady Fauconberge, the other coheiress, a moiety of the estate, on the ground that the settlement of 1712 was revoked by the deed of 1715. On the part of Lord and Lady Fauconberge it was contended, that the deed of 1715, being made only for a particular purpose, it would be a revocation, but *pro tanto*, and that the residue of the estate continued subject to the old trusts, but the Lord Chancellor and the Master of the Rolls and the Lord \* Chief Baron, by whom he was assisted, were all of opinion \* 412 that the deed of 1715 operated as a total and not merely as a partial revocation of the deed of 1712. Comparing the limitations in *Fitzgerald v. Lord Fauconberge* with those in the present case, and advertting to the grounds of the judgment as expressed by the Lord Chief Baron: "that it appeared to have been Mr. Fowler's intention to do an act inconsistent with the former settlement, and to put the estate in a different channel," I cannot help feeling its close application to the question which we are called upon to determine.

If I could have adopted the view which appears to have been taken by the Master of the Rolls in this case, that the deeds of November, 1817, and of March, 1818, were all to be treated as constituting one transaction, I should have had little difficulty in coming to the same conclusion at which his Honor arrived, but I am unable to view the deeds in this light. The deed of 1818 seems to me to be detached from the deeds of 1817, by the indications of intention, which it exhibits on the part of Heather, to exercise the independent power which he possessed, of creating new limitations. It was not necessary to enable him to raise money that the joint power in the deed of 1817 should have been converted into a sole power, for he and his wife might together have employed the joint power to accomplish his object. But it appears to me to be improper to refer to any considerations connected with the deeds of November, 1817. The power is actually conferred, and the question depends solely upon the mode of its exercise by the deed of the 25th of March, 1818.

It is not an unimportant circumstance in my judgment that we are dealing here with a single intention, and are not embarrassed, as in the cases where the husband and \* wife joined \* 413 in the deed, with any possible conflict of intentions. Col-

lecting, therefore, the intention of the husband from the limitations in the deed, I am compelled to come to the conclusion, that the ulterior uses in the deed of November, 1817, were completely changed, and that there was a resettlement of the lands by the deed of the 25th of March, 1818. The nature of the deed seems to me to correspond with this intent. Hunter and Cox, the trustees in the deed of the 26th November, 1817, are brought in as parties to the new arrangement, not for the purpose of upholding the old uses, but to pass the legal estate to a new trustee, which legal estate is entirely exhausted by the new uses. It is difficult to reconcile this transaction with the notion that the old uses were in any respect to be upheld.

It has been argued that the uses in favour of Heather were conditional only, and that the power on which they depend was never executed; but (as I have already shown) we are dealing with the question of intention upon the deed itself, which cannot be interpreted by any subsequent act or omission. Suppose the money had been paid to Heather, or the residue of the land had been conveyed to him, could he have been made a trustee for the ultimate uses of the old settlement? I think that this could scarcely be contended. But if not, then the deed could not have left the old uses unchanged, nor have rendered Murch, the new trustee in the deed of March, 1818, a trustee for the uses of the settlement; and the result must, therefore, in my judgment, be, that there was a substitution of new uses for the old, under which the heir of the husband has become entitled.

I therefore find myself constrained to differ with the judgment of the Master of the Rolls, and to hold that the plaintiff was \* 414 entitled to a part of the prayer of his <sup>\*</sup> bill. With respect to that portion of the lands to which (as already mentioned) the Statute of Limitations constitutes a bar, his bill must be dismissed with costs, but as to the other part, he is entitled to a conveyance, and to the rest of the relief which he prays.

THE LORD JUSTICE TURNER.—I am of the same opinion. The question is, whether the deed of the 25th of March, 1818, operated only to charge the estate comprised in it, or operated also beyond that purpose, to alter the limitations of the estate subject to the charge. This question depends upon the intention to be collected from the deed.

On cases thus depending on intention there cannot, of course, be any general rule. Each case must depend upon its own particular circumstances. The authorities seem to me to furnish us with no further guide than that the charge upon the estate being, of course, in cases of this nature, the immediate motive of the deed, the Court will not impute the further intention to change the limitations, unless that further intention appears by recital or other special circumstances, and that the mere fact of the reservation of the equity of redemption deviating in a slight or partial degree from the original limitations of the estate, does not of itself furnish sufficient ground for imputing the further intention to change the limitations, but is rather to be ascribed to inaccuracy or mistake.

The facts of this case have been already stated by the Lord Chancellor, and I do not, therefore, repeat them. It is sufficient for me to observe, that this is not the mere ordinary case of mortgage; that there is here an appointment and conveyance of the estate, upon trusts expressly declared; and that there is here also not \*merely an appointment by a person who had \* 415 an absolute power over the estate, but a conveyance by the trustees in whom the estate was vested, upon trusts which were to take effect in default of and subject to the exercise of the power. These facts appear to me to be of great importance in considering the question of intention.

There is, I think, some difference between the mere ordinary case of mortgage and the case of an appointment and conveyance like the one before us; and certainly there is, in my opinion, a great difference between a mere appointment by a person who has an absolute power, and such an appointment coupled with a conveyance by the trustees who held the estate upon trusts subject to the power. In the case of a mere ordinary mortgage, in which the reservation of the equity of redemption differs from the original limitations of the estate, the Court has no guide for determining between the constructive trust which arises from the terms in which the equity of redemption is reserved, and the trust which would otherwise result; but where there is a trust expressly declared, it is far otherwise. The Court cannot reach back to the original limitations without countervailing the trust which is expressly declared.

Again, where there is an appointment by a person having an absolute power, he is the entire owner or master of the property,

and no liability can attach upon him in whatever mode he may think proper to reserve the equity of redemption ; but the case is surely very different where there is such an appointment coupled with a conveyance by the trustees who hold upon trusts subject to the power. Such trustees cannot be justified in conveying, unless

there be an intention to alter the limitations. To apply

\* 416 these observations to the case \* before us, how is the express trust for William Edward Heather, which this deed creates in Murch, to be countervailed ? And are we to impute to the trustees in whom the estate was vested that they were guilty of a breach of trust in concurring in this deed ? I cannot bring my mind to either of these conclusions, and I think, therefore, we are bound to consider that it was intended by this deed not merely to create the charge, but also to alter the rights in the estate subject to the charge.

Reliance was placed, on the part of the respondents, upon the recital of the settlement contained in this deed not extending beyond the power of appointment, but I am not sure that this circumstance is not rather unfavourable than favourable to the respondents' case. At all events it cannot aid them, for though the recital of the power shows that it was intended to be acted upon, it shows nothing as to the extent to which the appointor intended to go in the exercise of it.

It was also insisted, on the part of the respondents, that, in the case of a mortgage, the reservation of the equity of redemption could in no case be looked at as evidencing the intention to change the limitations, and that the trusts in this case ought not, therefore, to be so regarded ; but I am not prepared to say, that in all cases of this nature the limitations of the equity of redemption are to be wholly disregarded, and much less am I prepared to say, that such trusts as those which are contained in the deed before us can be so dealt with. I agree that in cases depending merely upon the reservation of the equity of redemption, variations which can reasonably be referred to mistake or inaccuracy are not to be

regarded ; but if the variations be such that they cannot \* 417 from their nature be referred to mistake or \* inaccuracy, I think they must have their effect. Suppose, for instance, an owner in fee mortgaged and reserved the equity of redemption to himself for life and then to his first and other sons in tail, it

could hardly, I think, be contended that he did not intend to alter the limitations of the estate subject to the mortgage.

The most important and difficult point in the case, however, was that suggested by my learned brother. He asked to whom the estate would have gone, if the money had been paid at the day appointed and there had been no default. This is certainly a point requiring to be answered; but, with great deference to my learned brother's opinion, I think there is a sufficient answer to it. The estate, as I apprehend, would have gone to William Edward Heather, the appointor under the ultimate trust, to convey to him the parts which, to use the language of the deed, should not be required to be sold for the purposes aforesaid.

One further observation may be made upon the question which we are considering. The respondents' argument seems to me to require us to assume that if part of the estate had been sold under the trusts of this deed, the surplus proceeds of the sale would have reverted to the original settlement. This is a conclusion which appears to me to be wholly irreconcilable with the import and provisions of this deed.

Authority is not, I think, wanting to support the view which the Lord Chancellor and I have taken of this case. In *Fitzgerald v. Fauconberge* (a) there was a trust almost if not absolutely identical with the trust in \*this case, and it was held, that \*418 the limitations were changed. I think, too, that the observations which Lord ST. LEONARDS has made in his work on Powers, upon the case of *Martin v. Michell*, (b) tend very much in favour of this view.

Lord ST. LEONARDS observes, that it seems to be clear that the intention was in that case shown to exclude all doubt of the equity of redemption having been deliberately resettled, and that it would be too dangerous to remodel such express limitations. This is the converse of that case.

Upon the grounds, therefore, which I have stated, I think that under the deed of the 25th of March, 1818, William Edward Heather became entitled to the equitable fee in the estate in question, subject to the security for 340*l.*, a conclusion to which I am much inclined to think from the judgment the Master of the Rolls himself would have come, had he not thought that the three deeds

(a) *Fitzg.* 207.

(b) *2 Jac. & W.* 413.

which have been mentioned were to be considered as parts of the same transaction, a point on which I find myself unable to agree with his Honor.

In my opinion, therefore, the plaintiff has established his title to a decree; but it was admitted on his part, that his claim is in part barred by the Statute of Limitations, and to that extent, therefore, the bill must be dismissed, and, I think, with costs.

As to the rest of the estate, too, the bill prays a conveyance, but from the evidence on the part of the defendants, there seems to be great reason to doubt whether the mortgage money was ever paid out of W. E. Heather's estate, and whether the defendants \* 419 or \* some of them, may not be entitled to the benefit of the mortgage. Under such circumstances there cannot, I think, be any decree for a conveyance without further inquiries, and the proper order to be made upon this appeal seems to me to be this :

Let the decree be varied and stand, and be as follows : —

Declare plaintiff, as heir of W. E. Heather, entitled to such parts of the estate comprised in the deed of the 25th of March, 1818, as Ann Armstrong was entitled to for her life, subject nevertheless to the payment of a due proportion of the whole, or such part, if any, of the 340*l.* secured by that deed as was not paid out of the estate of the said W. E. Heather, including, as part of such estate, the share of the purchase-moneys assigned by the indenture which belonged to the said W. E. Heather and M. A. his wife, or either of them, and subject also to the payment of such interest as may be due in respect of the said proportion of the said purchase-money.

Let an inquiry be made, whether the whole or any and what part of the said sum of 340*l.* was paid out of the estate of the said W. E. Heather, including as aforesaid, and how and in what manner, and out of what funds, and to whom belonging, and how derived, so much, if, any, of the said sum of 340*l.* as may not have been paid out of the estate of the said W. E. Heather, including as aforesaid, was paid, and who is now entitled to the same, and what is due for interest thereon.

In case it shall be found that any part of the 340*l.* was not paid out of the estate of W. E. Heather, including as aforesaid, \* 420 let the relative values of the parts \* of the estate comprised

in the aforesaid deed, to which the said Ann Armstrong was entitled for life, and of the parts to which she was not so entitled, be ascertained.

Dismiss the rest of the bill with costs.

THE LORD JUSTICE KNIGHT BRUCE.—Upon the question whether the deeds of the 24th and 26th of November, 1817, or either of them, ought to be viewed as part of a single transaction, of which the deed of March, 1818, formed another part, I abstain from expressing any opinion. However this may have been, I think that the plaintiff has no case. His claim depends on the proposition that William Edward Heather ought to be considered as having by the deed of March, 1818, intended to affect his wife's interest in the hereditaments comprised in it, to a greater extent than so far only as to make them, in the manner shown by the instrument, a security to the lenders of the 340*l.*, for the payment to them of that sum, with interest, a proposition that, in my judgment, is not established. It seems to me consistent with fixed and recognized rules, to hold that the language of the instrument ought not to be interpreted as having effected not merely a security for money, but also a total destruction of the wife's interest in the land, nor can I persuade myself that the husband so meant. I conceive it to be a just conclusion, that had it been so intended, the deed of 1818 would have been framed differently from the manner in which it is framed, and that the bill having been dismissed with costs, ought to remain in that condition, and the petition of appeal to take the same course : but the Lord Chancellor and the Lord Justice TURNER both thinking otherwise, the order of the Court will, of course, be according to their united opinion.

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## \* KNIGHT v. BOWYER.

1858. February 19, 20, 22, 23. May 7. Before the LORDS JUSTICES.

Sir G. B. granted to six persons annuities, payable out of his life-interest in the R. estate. He then executed a deed, called a receivership deed, to which the six annuitants and B. and R. were parties, by which he appointed B. and R. receivers of the rents; and it was declared that they should hold the rents in trust to pay the annuities, and then to pay the surplus to Sir G. B. or his assigns. The receivers accepted the trust. By another deed Sir G. B. conveyed his life-estate to a trustee on trusts for securing the six annuities, and subject thereto in trust for himself. He afterwards granted annuities to three other persons, and by a deed called a deed of direction, to which the three annuitants were parties, he directed the receivers and the trustee to pay the three annuitants out of the rents. Notice of this deed was immediately served on the receivers and the trustee. *Held*, by the Lord Justice TURNER, affirming the decision of the Master of the Rolls (*dubitante* the Lord Justice KNIGHT BRUCE): —

1. That the deed of direction made the receivers and the trustee express trustees for the three annuitants, subject to the rights of the six annuitants.
2. That in cases of express trust the Statute of Limitations is no bar to the demand of a *cestui que trust*, though the other *cestui que trusts* have for more than twenty years received from the trustee the whole of the rents to the exclusion of the claimant.<sup>1</sup>

Whether the rules as to refusing relief in cases of stale demands apply in cases of express trust. *Quære*.

One of the three annuities, and a share of another of them, were, pending a suit in which the title to them was in litigation, purchased in the name of T. T., by the deed transferring them to him, covenanted to indemnify the vendors against past and future costs; and at the same time he executed a declaration of trust, showing that the purchase was made principally on behalf of certain solicitors who acted in the suit for the parties entitled to the residue of the three annuities, but were not the solicitors of the vendors. *Held*, by the Lord Justice TURNER, affirming the decision of the Master of the Rolls, that the purchase was not affected by the laws relating to champerty and maintenance, and that even assuming it to be voidable as between the vendors and purchasers, the objection could not be taken by third parties.<sup>2</sup>

The persons entitled to the three annuities offered by their bill to redeem the six

<sup>1</sup> See Lewin Trusts (5th Eng. ed.) 620, 636, 637; Cox v. Dolman, 2 De G., M. & G. 592, note (1); 1 Dart V. & P. (4th Eng. ed.) 351, 352; 2 Sugden V. & P. (8th Am. ed.) 484; 2 Story Eq. Jur. § 1620 a; 1 Dan. Ch. Pr. (4th Am. ed.) 644, note (3) and cases cited, 649.

<sup>2</sup> See 1 Sugden V. & P. (8th Am. ed.) 357, and cases in note (o); 1 Dart V. & P. (4th Eng. ed.) 223.

prior annuitants. *Held*, by the Lord Justice TURNER, affirming the decision of the Master of the Rolls (*dubitante* the Lord Justice KNIGHT BRUCE), that it is in the discretion of the Court whether it will enforce against a plaintiff an offer made by his bill, and that under the circumstances of the present case, the offer ought not to be so enforced.

*Held*, also, by the Lord Justice TURNER, that there is no rule that an annuitant whose annuity is repurchasable, and whose title is not impeached, cannot be sued in equity, except for the purpose of redemption.

H. B. was entitled for life to a charge on the R. estate, subject to which the charge belonged to Sir G. B. absolutely. H. B. purchased for value the reversionary interest of Sir G. B. in the charge, with knowledge that the rents of the estate were not received by Sir G. B., but by B. as a trustee for some persons to whom Sir G. B. had granted annuities. *Held*, by the Lord Justice TURNER, affirming the decision of the Master of the Rolls (*dubitante* the Lord Justice KNIGHT BRUCE), that H. B., knowing that the rents were received by B., was bound to inquire on whose behalf he received them, and having made no inquiry must be deemed to have had notice of the rights of the persons for whom B. was a trustee,<sup>1</sup> and that, therefore, the executor of H. B., after her death, could not, during the life of Sir G. B., set up the charge against the three annuitants.

THIS case came before the Court on two petitions of appeal against a decree of the Master of the Rolls; one presented by the defendant, Mr. George Bowyer, and the other by the defendant, Edward Kynaston Bridger. The general outline of the case, which \* involved various points, may be thus stated. \* 422 The plaintiffs in the suit, and some of the defendants, were interested in three several annuities, which were granted by the defendant, Sir George Bowyer, by three several indentures, dated the 30th of August, 1814, and which were, by those indentures, charged upon the defendant Sir George Bowyer's life-interest in an estate called the Radley estate. The other defendants were variously interested in a mortgage upon the Radley estate, in a sum charged upon that estate for portions, in a judgment entered up against the defendant, Sir George Bowyer, by Alexander Donovan, since deceased, for securing an annuity granted to him, and in six several other annuities, which were granted by the defendant Sir George Bowyer by six several indentures, dated the 25th of June, 1814, and which were, by those indentures, also charged upon the defendant Sir George Bowyer's life-interest in the Radley estate. The bill was filed for the purpose of rendering the life-estate of

<sup>1</sup> See 2 Dart V. & P. (4th Eng. ed.) 791, 792; 2 Sugden V. & P. (8th Am. ed.) 774.

Sir George Bowyer available for the payment of the annuities in which the plaintiffs were interested, which were called "the three annuities," and for establishing the priority of those annuities over some of the other charges on the life-estate, or, failing that case, for redeeming those other charges. It was never disputed that the mortgage and the charge for portions had priority over the three annuities, nor was it on the appeal disputed that the six annuitants

had priority over the plaintiffs in respect of the three annuities ; but the plaintiffs, by their bill, claimed \* to rank *pari passu* with the six annuitants, and it was not until shortly before the hearing of the cause that this claim was abandoned. The defendant Mr. George Bowyer, who claimed to be entitled to the mortgage and the charge for portions, and to be entitled also to the six annuities, subject to mortgages which he had made of them in favour of some of the other defendants, had been, for some time before the institution of the suit, in possession or receipt of the rents and profits of the estate ; and it appeared that the defendant Edward Kynaston Bridger, who had an interest as mortgagee in the six annuities, or some of them, had also many years previously been in receipt of the rents of the estate for some short period of time. The decree directed an account against these two defendants ; and they, thereupon, presented the appeals in question.

It will now be necessary to state more particularly the facts and circumstances upon which the particular questions respectively depended. The decree treated the three annuities as subsisting charges, and gave the plaintiffs relief on that footing. The appellants contended that they were barred by the Statute of Limitations, 3 & 4 Will. 4, c. 27. The facts of the case as to this part of the question will be found in the report of the case, 23 Beav. 610, and were, so far as is material, as follows :—

In and prior to the year 1814, Sir George Bowyer was equitable tenant for life, without impeachment of waste, of the Radley estate, subject to four incumbrances : first, a mortgage for 9560*l.*, which was vested in Henrietta Lady Bowyer for life, with the absolute interest in reversion to Sir George Bowyer ; secondly, 7125*l.* due to the four brothers and sisters of Sir George Bowyer (being

\* 424 the residue of a charge of 10,000*l.* upon the estate for portions of the younger children of the prior owner \* of the estate) ; thirdly, an annuity of 30*l.*, which subsequently determined ; and, fourthly, another annuity of 250*l.*, also since

determined. While Sir George Bowyer was thus entitled, a person named Donovan obtained judgment against him in respect of securities for three annuities, the consideration for which was 7758*l.* Judgment was entered up in March, 1814.

On the 25th of June, 1814, Sir George Bowyer, in consideration of 15,994*l.*, granted the six annuities to six persons, and afterwards executed a deed of the 28th of June, 1814, made between Sir George Bowyer of the first part, the six annuitants of the second, third, fourth, fifth, sixth, and seventh parts respectively, and Ballachy & Ralfe of the eighth part (being a deed which in the argument was called "the receivership deed.") It recited, first of all, the deeds granting the annuities; it then recited an agreement that it should be lawful for Sir George Bowyer, by mortgage or grant of annuities, to raise any further sum not exceeding in the whole (including the considerations for the six annuities already granted, and including, also, any judgments which, at the time of such further sum being raised, might be available against the said hereditaments) the sum of 20,000*l.*; and that such further grantees of annuities, or mortgagees, should stand and be entitled *pari passu* with the six. Then there was a recital of the six annuities; and the deed witnessed, that, in consideration of the sums, amounting to 15,994*l.*, which had been paid for the purchase of the six annuities, Sir George Bowyer appointed Ballachy & Ralfe his agents to receive the rents of the estate, and to take all lawful steps, by action, distress, or otherwise, to obtain payment thereof; and he directed the tenants to pay to Ballachy & Ralfe, and declared that their receipts should be good discharges to the tenants. The indenture then went on to declare, that all the rents and profits so to \* be \* 425 received by Ballachy & Ralfe should be applied upon and for the trusts, interests, and purposes after mentioned, that was to say, upon trust, first, to pay taxes and rates; in the next place, to pay the interest on the 10,000*l.* (that being the charge of which the 7125*l.* was part); and, in the next place, to pay the two annuities of 250*l.* and 30*l.*; and, in the next place, to pay the six annuitants, and such other grantees of annuities and mortgagees as might advance any further sum or sums of money on the security of the said hereditaments pursuant to the terms of the proviso (*i.e.*, the agreement giving power to Sir George Bowyer to create further charges, so as to make up the 15,994*l.* to 20,000*l.*), all

their annuities *pari passu*; and, lastly, that they should pay to Sir George Bowyer, or his assigns, or to such other person or persons as he or they should direct, the clear residue of the rents and profits; and that out of such residue should be deducted a commission of 5*l.* per cent on the gross amount received, and also the costs and expenses to which the receivers might be put. The deed also contained a covenant by Sir George Bowyer, not to revoke the powers therein contained without the consent of the six annuitants; and that if the receivers, or either of them, should die, or refuse to act, or become incapable of acting, Sir George Bowyer should appoint such other person or persons in their place as the six annuitants, or the major part of them, should appoint, and that the six annuitants themselves might make that appointment, if Sir George Bowyer refused or neglected to make it. The deed, as will have been observed, took no notice of the 9560*l.* mortgage, which was the first charge on the Radley estate.

On the same 28th of June, 1814, Sir George Bowyer executed another deed, called the "trust deed," by which he appointed Bridger (who, it appeared, was a partner of Ballachy, one \* 426 of the receivers) to be a trustee of the \* Radley estate.

By that deed, which was made between Sir George Bowyer of the first part, the six annuitants of the six following parts, and Edward Bridger of the eighth part, after reciting the receivership deed, and an agreement made when the six annuities were granted that the hereditaments charged with the annuities should be conveyed to the use of Edward Bridger, his heirs and assigns, upon the trusts thereafter mentioned, for better securing the payment of the six annuities, and also any other annuities, or the interest of any mortgages, which might thereafter be charged upon the hereditaments under the proviso already mentioned; it was witnessed, that in consideration of the sums paid for the purchase of the six annuities, Sir George Bowyer conveyed the Radley estate, and all his estate, right, title, and interest therein, to hold to Edward Bridger, his heirs and assigns, during the life of Sir George Bowyer, subject to the charge of 10,000*l.* and the two annuities of 250*l.* and 30*l.*, upon trust to permit Sir George Bowyer to receive the rents until default should be made in payment of some one of the six annuities, or other annuities to be granted as aforesaid, for the space of sixty days, and thereupon to sell the said hereditaments, and stand possessed of the proceeds, and

apply the same, first in payment of the expenses, then in payment of the six annuitants and subsequent annuitants, and subject thereto, in trust for Sir George Bowyer, his executors, administrators, and assigns. Under these deeds Ballachy was put into the possession of the rents as receiver.

By three deeds, dated the 30th of August, 1814, Sir George Bowyer (professing to act under the power which was contained in the receivership deed and trust-deed to raise a further sum) granted to Knight, Bernard, & King (called in the argument "the three annuitants"), three several annuities of 285*l.*, 142*l.* 10*s.*, and 142*l.* 10*s.*, for his life, issuing out of, and charged on, \* his life-interest in the Radley estate. Each of these deeds \* 427 recited that he was seised of the Radley estate for an estate of freehold during his life without impeachment of waste, subject to the sum of 10,000*l.*, and interest, charged thereon for portions to his brothers and sisters, and to an annuity of 250*l.* to Henrietta Lady Bowyer, again omitting any reference to the 9560*l.* mortgage; and in each of these three annuity deeds Sir George Bowyer covenanted to pay the three annuities, that he had good right to grant the three annuities, and to grant powers and remedies for compelling payment of them, and to charge them upon the Radley estate, and that the estate should continue charged with them, and liable to distress and entry for the recovery of the same; and he covenanted to indemnify the three annuitants against the charges and incumbrances thereinbefore mentioned, and all other charges and incumbrances whatsoever.

It appeared that the three annuitants had constructive notice of Donovan's judgment, and so had notice that Sir George Bowyer had raised more than 20,000*l.* when he granted the three annuities. This, however, was not discussed on the appeal, the claim of the three annuitants to rank *pari passu* with the six having been abandoned.

On the same 30th of August, 1814, Sir George Bowyer executed a deed (which was called "the deed of direction") to the receivers Ballachy & Ralfe, and to Bridger, the trustee, by which he directed them to pay certain rents of the Radley estate to "the three annuitants." That deed was made between Sir George Bowyer of the first part, and the three annuitants of the second, third, and fourth parts. It recited the granting of the six annui

ties, and recited the trust-deed by which the life-estate had been conveyed to Bridger, upon trust for sale to secure the \* 428 annuities. It recited the receivership deed, by which the trusts had been declared of the rents and profits to be received by Ballachy & Ralfe. Then it recited the granting of the three annuities, and witnessed that in pursuance of an agreement made by Sir George Bowyer in that behalf, Sir George Bowyer authorized, empowered, required, and directed Ballachy, Ralfe, & Bridger respectively to exercise the powers and authorities in them respectively reposed by virtue of the trust-deed and receivership deed respectively, and to do so for the purposes of raising and paying, not only the annuities to the "six annuitants," but also the three annuities to Knight, Bernard, & King, and to make such payments unto the six annuitants, and unto Knight, Bernard, & King, respectively, of their several annuities *pari passu*, and without any preference or priority whatsoever. And further, he directed Ballachy, Ralfe, & Bridger, the receivers and trustee, to withhold from him payment of every part of the trust moneys which might come to their hands by virtue of the several trusts aforesaid, until Knight, Bernard, & King, as well as the six annuitants, should be respectively fully paid all arrears of their annuities. And, lastly, he covenanted with Knight, Bernard, & King, that Ballachy, Ralfe, & Bridger, the receivers and trustee, should act in all respects touching the premises pursuant to the directions and authority by him Sir George Bowyer to them given.

Immediately after the execution of the last-mentioned deed, notice of it was served upon the receivers and upon the trustee. Some time after the execution of the deed, there was a sale of timber on the estate, and a question having arisen as to the application of the proceeds, Ballachy & Bridger (who, as above mentioned, were in partnership as solicitors), in a letter which they wrote to the solicitors of the three annuitants, expressed \* 429 \* themselves thus: "There are some arrears due to the first class of annuitants, after payment of which there seems no objection to apply the surplus of the timber money in hand towards payment of the arrears of the second class, upon an indemnity." A further correspondence on the subject of the payment of the three annuities went on between the parties, more particularly with reference to a claim which Donovan put in alleg-

ing that he was entitled to come in under the trust for filling up the 20,000*l.*, so as to fill up that sum, and exclude the three annuitants from coming in *pari passu* with the six annuitants.

On the 27th of November, 1816, Ballachy & Bridger wrote to the solicitor of the three annuitants, as follows:—

“ Having received a regular notice from Mr. Donovan, we cannot consent to distribute any more money till we have learnt the extent of his claim, which we will make a point of inquiring into.”

Again, on the 18th of December, 1816, they wrote as follows:—

“ We have no wish whatever to give Mr. Donovan a preference to the three last annuitants, but we do not feel justified in distributing the timber money in hand, even with an indemnity, until Mr. Donovan’s claim is in some manner disposed of. We are as anxious as yourselves to avoid getting into chancery, but when Mr. Donovan is threatening a suit in equity on one side, and the three last annuitants holding out the same threat on the other, you will admit we cannot with safety part with the money until we know who are strictly entitled to it.”

The rents of the estate were received by Ballachy \* or \* 430 by Bridger down to the death of Bridger, in 1846, but they were insufficient, after paying interest on prior charges, to pay both Donovan and the six annuitants; therefore, Donovan and the six annuitants, in 1817, came to an arrangement as to the way in which the rents should be appropriated between them. In June, 1819, the six annuitants gave Ballachy & Bridger a bond of indemnity against the consequences of paying the rents according to this arrangement, and it was accordingly acted upon. It was a question much discussed in the cause, whether the rents were received by Ballachy as receiver, or by Bridger as trustee, but it did not become necessary to determine this question of fact. In 1846, after the death of Bridger, Edward Kynaston Bridger received the rents for about one year, and then Mr. George Bowyer, who had become entitled to the 9560*l.* mortgage, in the mode hereafter stated, entered into possession of the estate, and had been in possession of it ever since. The three annuitants received from Sir

George Bowyer the first two quarterly payments of their annuities, but had not received any thing since.

The charge for 9560*l.*, as has been stated, belonged to Henrietta Lady Bowyer for life, the reversionary interest belonging to Sir George Bowyer absolutely. On the 15th of May, 1837, Sir George Bowyer, for a valuable consideration, assigned his interest to Henrietta Lady Bowyer absolutely. Previous to this assignment, Lady Henrietta knew that the rents of the estate were received by Ballachy & Bridger, or one of them, as receivers for some persons entitled to annuities, and her agent and solicitor, Mr. Curtis, was in the habit of attending the audit of the rents, and receiving from Bridger the interest on the 9560*l.*, for which he gave receipts to Bridger. On the 17th of May, 1837, Henrietta Lady Bowyer

made a voluntary settlement of the 9560*l.*, limiting it to  
\* 431 \*herself for life, with remainder during the joint lives of Sir

George Bowyer and Lady Ann Bowyer, to the separate use of Lady Ann Bowyer, and after the decease of the survivor of herself and Lady Ann to Mr. George Bowyer absolutely. Lady Ann Bowyer died in 1844, and Lady Henrietta on the 15th of November, 1845; whereupon Mr. George Bowyer, having become entitled to this charge, entered into the receipt of the rents of the estate by virtue of it.

One of the three annuities remained vested in the representatives of Knight, who was one of the original three annuitants. Tomkinson, another of the plaintiffs, had purchased an interest in the other two annuities, in manner now to be stated.

By deed, dated 6th September, 1814, King, one of the three annuitants, assigned to James Ralfe for a valuable consideration four-fifths of his annuity of 142*l.* 10*s.* Some years afterwards the suit of *Hele v. Lord Bexley* (a) and a suit of *Bridger v. Bourger* were instituted to ascertain the charges on the Radley estate. Joseph Bernard, the executor of Peter Bernard, another of the three annuitants, was a party to these suits, and his solicitor in them was the above-named Mr. Ralfe, whose London agent was Mr. Braikenridge. In 1852, Messrs. Trinder & Eyre, solicitors, who acted in those suits as the agents of the country solicitors of Knight, one of the three annuitants, negotiated with Mr. Ralfe and J. Bernard for the purchase of Bernard's annuity, and the four-

(a) See 11 Beav. 537; 15 Beav. 340; 17 Beav. 14, and 20 Beav. 127.

fifths which Ralfe had purchased in King's annuity. This purchase was made on behalf of Trinder & Eyre, of Tomkinson, and of Sharp, Harrison, & Sharp, the \*country solicitors \* 432 of Knight. The arrangement was carried out by a deed, dated the 20th of July, 1852, made between J. Bernard of the first part, Ralfe of the second part, and Tomkinson of the third part, by which, after reciting an agreement by Tomkinson to purchase Bernard's annuity and Ralfe's four-fifths of King's annuity for 200*l.*, J. Bernard and Ralfe respectively assigned the annuity and shares of annuity to Tomkinson, with a power of attorney authorizing him to sue in their names. This deed contained a covenant by Tomkinson that he, his executors, administrators, or assigns, "shall and will from time to time and at all times hereafter pay unto and in the mean time save harmless and keep indemnified the said Joseph Bernard and James Ralfe, their and each of their heirs, executors, and administrators, of, from, and against all costs, charges, and expenses hereupon to be incurred and which he or they shall or may therefore be put unto, bear, pay, or sustain for or by reason or on account of the name or names of the said Joseph Bernard and James Ralfe, their executors or administrators, being used in any action, suit, or other proceeding, whether as complainant or defendant, which may be brought, commenced, or prosecuted, by virtue of any power or authority hereby given, or in pursuance hereof to be given, to the said R. Tomkinson, his executors, administrators, or assigns, so as the same do not arise or accrue through the collusions or acts of the said Joseph Bernard and James Ralfe, or either of them, their or either of their executors, administrators, or assigns.

On the 2d of August, 1852, a memorandum of agreement between Tomkinson of the first part, Trinder & Eyre of the second part, and Sharp, Harrison, & Sharp of the third part, was entered into, which recited the last-mentioned deed, and also recited that Trinder & Eyre, by two letters, dated the 26th of July then past, written \* to Bernard & Ralfe, after referring to the \* 433 above deed, and stating that they were the solicitors of Tomkinson, and would be employed by him, and use the names of Bernard & Ralfe in all proceedings to obtain payment of the arrears of the annuities, undertook with Bernard & Ralfe to save them harmless from all costs, charges, and expenses to be incurred in their or either of their names from that day, it being understood

that all costs, charges, and expenses to be incurred from that day should be incurred through the solicitor of Tomkinson, unless through any default of his or his solicitors it should become necessary for them or either of them to employ any other solicitor, in which case Trinder & Eyre undertook to pay all costs, charges, and expenses properly incurred by them or either of them the said Bernard & Ralfe. The agreement also recited that the purchase had been made by Tomkinson on behalf of himself and the other parties to the agreement in the shares therein mentioned, and by the witnessing part Tomkinson declared that he would stand possessed of the one annuity and the four-fifths of the other annuity in trust for himself and the other parties to the agreement in equal shares; and the parties agreed to bear all costs and expenses in equal shares.

The plaintiffs by their bill sought to establish the three annuities as charges on the life-interest of Sir George Bowyer in the Radley estate *pari passu* with the six annuities, and in priority to the mortgage for 9560*l.*, and the bill contained an offer in these terms: "If it shall appear that the annuities granted to the said Alexander Donovan deceased, or the said judgment obtained by him, or the said six annuities granted to the said six annuitants, are entitled to priority of payment over the said three annuities granted to the

said three annuitants, then that the plaintiffs may be at liberty to pay to the defendants George Bowyer, Wilson

Lomer, Charles Bridger, and Charles King the price or consideration moneys for the purchase of the said six annuities, and to pay to the defendant Alexander Donovan what (if any thing) is due upon the said judgment, which the plaintiffs hereby offer to do; and that thereupon the defendants George Bowyer, Wilson Lomer, Charles Bridger, Charles King, and Alexander Donovan may be decreed to assign to the plaintiffs the said judgment and annuities respectively, and all securities affecting the same."

The cause came on to be heard before the Master of the Rolls. (a) His Honor decided that the plaintiffs were not barred by the Statute of Limitations, and that Henrietta Lady Bowyer had constructive notice of the title of the plaintiffs when she purchased the reversion of the 9560*l.* mortgage from Sir George Bowyer. By the decree it was on this point declared as follows: "And it is

(a) 23 Beav. 609.

further declared, that the mortgage debt of 9560*l.* in the pleadings mentioned is the first incumbrance upon the Radley estate, or on that part thereof which is by the indentures dated respectively the 29th and 30th days of September, 1795, in the plaintiffs' bill mentioned made the subject of the said charge. And it is further declared, that the said mortgage debt of 9560*l.* is now vested in the defendant George Bowyer, but that the same is not to be raised or paid during the lifetime of the defendant Sir George Bowyer, unless the said three annuities shall have been first duly discharged or satisfied." The decree then directed an account of the rents and profits of the Radley estate received by the defendant George Bowyer, or which without his wilful default might have been received by him ; and in taking such account he \* was to be \* 435 disallowed all sums in respect of the payments made by him or to him on account of interest on the mortgage of 9560*l.*, since the 15th day of November, 1845, the day of the death of Lady Henrietta Bowyer. The decree also directed an account of the rents received by the defendant Bridger. Bridger and George Bowyer severally appealed.

*Mr. Selwyn* and *Mr. Hislop Clarke*, for the plaintiffs.—The deed of direction of 1814 creates a trust taking the case out of the Statute of Limitations. Moreover, the rents were insufficient to keep down the annual payments having priority over the three annuities, there was, therefore, nothing out of which the three annuities could be paid, and the statute cannot run against them. Bridger did not repudiate the trust for the three annuitants, and must be treated as being their trustee. *Stone v. Godfrey.* (a) Lady Bowyer could not have set up her mortgage against the three annuitants, for she knew that the rents were received by Bridger, and that was sufficient constructive notice of the title of the persons for whom he received them. *Daniels v. Davison,* (b) *Allen v. Anthony,* (c) *Bailey v. Richardson.* (d) Bridger evidently was a trustee for the three annuitants, as well as the six. There was, therefore, constructive notice of the title of the three annuitants, and the defendant George Bowyer, claiming as a volunteer under Lady Henrietta Bowyer, cannot be in any better position than she.

- (a) 5 De G., M. & G. 76, 92.  
(b) 16 Ves. 249.

- (c) 1 Mer. 282.  
(d) 9 Hare, 734.

The case of the plaintiffs is not open to objection on the ground of maintenance. *Williams v. Protheroe*, (a) *Harrington v. Long*. (b)

\* 436 \* *Mr. Rolt* and *Mr. Wickens*, for the defendant George Bowyer; *Mr. Roundell Palmer* and *Mr. Druce*, for the six annuitants and E. K. Bridger.—The Statute of Limitations is a bar to the plaintiffs' claim, there being no express trust in their favour. *James v. Salter*, (c) *Francis v. Grover*, (d) *Burroughs v. M'Creight*, (e) *Culley v. Taylerson*, (g) *Nepean v. Doe d. Knight*, (h) *Melling v. Leake*, (i) Neither the receivership deed nor the trust deed created a trust for them; nor did the deed of direction, as Bridger repudiated the trust, and so never became their trustee. Serving notice of that deed on him might create an equity, but could not make him an express trustee. If the plaintiffs are not wholly barred they are confined to six years' arrears, there being no such express trust as was the ground of the decisions in *Ward v. Arch*, (k) *Cox v. Dolman*, (l) *Snow v. Booth*. (m) Even if there were an express trust for the plaintiffs, their case must still fail, for the Statute of Limitations applies where one *cestui que trust* is ousted by another: *Cholmondeley v. Clinton*, (n) though not as between trustee and *cestui que trust*. This, moreover, is a stale demand, and ought to be refused on that ground.

Supposing the Court to be against us on these points, we still say that we are entitled to the full benefit of Henrietta Lady Bowyer's mortgage. The doctrine of *Daniels v. Davison*, (o) and *Allen v. Anthony*, (p) as to constructive notice, does not, \* 437 we submit, extend to the \* present case. Those cases only establish that notice of occupancy is notice of all the rights of the occupying tenant. Here no inquiry from the tenants would have given Lady Henrietta any information of the plaintiffs' title. All she knew was, that Bridger received the rents; that, at all events, cannot be notice of more than Bridger would have told her

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| (a) 5 Bing. 309.                    | (i) 16 C. B. 652.         |
| (b) 2 M. & K. 590.                  | (k) 12 Sim. 472.          |
| (c) 2 Bing. N. C. 505; 3 Ibid. 344. | (l) 2 De G., M. & G. 592. |
| (d) 5 Hare, 39.                     | (m) 2 K. & J. 182.        |
| (e) 1 Jo. & Lat. 290.               | (n) 2 Jac. & W. 1.        |
| (g) 11 Ad. & E. 1008.               | (o) 16 Ves. 249.          |
| (h) 2 M. & W. 911.                  | (p) 1 Mer. 282.           |

if she had asked him why he received them, and he, if asked, would have said that he received them for the six annuitants.

[THE LORD JUSTICE TURNER.— Suppose he had been asked, he, perhaps, would have stated that the three had claimed to treat him as their trustee.]

The doctrine of constructive notice is not to be extended, and as he did not admit himself to be their trustee, it is not to be presumed that he would have given such an answer. *Bailey v. Richardson* (a) is explained by *Barnhardt v. Greenshields*, (b) which shows that occupancy gives constructive notice only of the rights of the occupier. If the doctrine is to be carried any further, the notice, at all events, can only extend to rights the existence of which would have been disclosed on inquiry. The doctrine of constructive notice is not to be extended. *Ware v. Lord Egmont*, (c) *Attorney-General v. Stephens*. (d) If there is no notice, we are safe as to this mortgage, for a plea of purchase for value without notice may be sustained without having the legal estate: *Fisher on Mortgages*, (e) where the cases are collected.

The plaintiffs' case fails on the ground of maintenance. The purchase was a purchase of a right to litigate, not a mere purchase of property *pendente lite*; and Trinder & Eyre wrote a letter to the annuitants, whose annuities they purchased, offering to indemnify them against costs. In *Simpson v. Lamb*, (g) a purchase by \* an attorney from his client, under circumstances like \* 438 these was held void, though the Court was inclined to the view that it would have been good if made by a stranger.

Supposing the plaintiffs' case not to fail on any of the above grounds, they are bound by the offer to repurchase contained in their bill. Such an offer was necessary. *Inman v. Wearing*, (h) *Knebell v. White*, (i) in the latter of which cases the bill was dismissed on that ground. An offer thus made cannot be retracted. *Bazzelletti v. Battine*, (k) *Pelly v. Wathen*, (l) *Holford v. Bur nell*. (m)

(a) 9 Hare, 734.

(h) 3 De G. & S. 729.

(b) 9 Moo. P. C. C. 18.

(i) 2 Y. & C. Exch. 15.

(c) 4 De G. M. & G. 460.

(k) 2 Sw. 156, n.

(d) 6 De G. M. & G. 111, 148.

(l) 7 Hare, 351.

(e) Page 297.

(m) 1 Vern. 448.

(g) 7 E. & B. 84.

*Mr. Selwyn*, in reply. — The argument of the appellant on the head of maintenance ignores the well-settled difference between the purchase of a mere right of litigation and the purchase of property which happens to be the subject of litigation. All the arguments, as to purchases by a solicitor from his client are utterly irrelevant here. Trinder & Eyre, though concerned in the suit, were neither solicitors nor agents of the parties whose interests they purchased. The arguments on the Statute of Limitations is disposed of by *Burrell v. Earl of Egremont.* (a)

Judgment reserved.

May 7.

The Lord Justice TURNER, after giving the general outline of the case, and mentioning in detail the facts set out above as bearing upon the effect of the Statute of Limitations, proceeded as follows : —

Under these circumstances, I agree with the Master of \* 439 the Rolls, that the Statute of Limitations neither bars \* nor extinguishes the rights of the plaintiffs in respect of these three annuities. This point involves, as it appears to me, these considerations: Was there a trust for the payment of these annuities ? Was the trust, if any, express, implied, or constructive ? If express, can the Statute of Limitations operate to bar the plaintiffs' claim ?

First, then, as to the existence and nature of the trust. It was argued for the appellants that the receivership deed was, so far as Sir George Bowyer was concerned, a deed of agency merely, revocable by him, so far as respects his interest ; that it was binding only to the extent of the securities for the 20,000*l.*, and that, it being now admitted that the consideration for these three annuities formed no part of the 20,000*l.*, the plaintiffs can have no claim under the trusts of that deed. And as to the trust-deed it was urged that the same considerations applied ; and further, that there was no trust of the rents and profits created by that deed, except in the event, which did not arise, of the estate becoming the subject of sale. It was insisted that the rights of the parties inter-

(a) 7 Beav. 205.

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if she had asked him why he received them, and he, if asked, would have said that he received them for the six annuitants.

[THE LORD JUSTICE TURNER.—Suppose he had been asked, he, perhaps, would have stated that the three had claimed to treat him as their trustee.]

The doctrine of constructive notice is not to be extended, and as he did not admit himself to be their trustee, it is not to be presumed that he would have given such an answer. *Bailey v. Richardson* (a) is explained by *Barnhardt v. Greenshields*, (b) which shows that occupancy gives constructive notice only of the rights of the occupier. If the doctrine is to be carried any further, the notice, at all events, can only extend to rights the existence of which would have been disclosed on inquiry. The doctrine of constructive notice is not to be extended. *Ware v. Lord Egmont*, (c) *Attorney-General v. Stephens*. (d) If there is no notice, we are safe as to this mortgage, for a plea of purchase for value without notice may be sustained without having the legal estate: *Fisher on Mortgages*, (e) where the cases are collected.

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Supposing the plaintiffs' case not to fail on any of the above grounds, they are bound by the offer to repurchase contained in their bill. Such an offer was necessary. *Inman v. Wearing*, (h) *Knebell v. White*, (i) in the latter of which cases the bill was dismissed on that ground. An offer thus made cannot be retracted. *Bazzelgetti v. Battine*, (k) *Pelly v. Wathen*, (l) *Holford v. Bur nell*. (m)

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| (a) 9 Hare, 734.               | (h) 3 De G. & S. 729.   |
| (b) 9 Moo. P. C. C. 18.        | (i) 2 Y. & C. Exch. 15. |
| (c) 4 De G., M. & G. 460.      | (k) 2 Sw. 156, n.       |
| (d) 6 De G., M. & G. 111, 148. | (l) 7 Hare, 351.        |
| (e) Page 297.                  | (m) 1 Vern. 448.        |
| (g) 7 E. & B. 84.              |                         |

receipt of the rents by Ballachy as receiver, clothed with a trust, and the estate vested in Bridger as trustee could not, as I conceive, be barred or extinguished whilst some of his *cestui que trusts*

were in receipt of the whole produce of the estate, and were  
 \* 441 in \* such receipt under a deed forming part of the same security. So that, assuming the construction of the trust-deed to be such as was contended for by the appellants, and assuming also Bridger never to have been in possession as trustee, the rights of the parties would remain the same.

There being, then, an express trust for payment of the three annuities, can the Statute of Limitations operate to extinguish them? I am of opinion that it cannot. The 24th section of the statute is as follows: "And be it further enacted that after the said 31st day of December, 1833, no person claiming any land or rent in equity shall bring any suit to recover the same but within the period during which, by virtue of the provisions hereinbefore contained, he might have made an entry or distress, or brought an action to recover the same respectively, if he had been entitled at law to such estate, interest, or right in or to the same, as he shall claim therein in equity." This section, if there had been no proviso, would have extended to cases of express trust, but the 25th section provides as follows: "Provided always, and be it further enacted, that when any land or rent shall be vested in a trustee upon any express trust, the right of the *cestui que trust*, or any person claiming through him, to bring a suit against the trustee, or any person claiming through him, to recover such land or rent, shall be deemed to have first accrued according to the meaning of this Act at and not before the time at which such land or rent shall have been conveyed to a purchaser for a valuable consideration, and shall then be deemed to have accrued only as against such purchaser and any person claiming through him." It is argued for the appellants, that this proviso applies only as between

the *cestui que trust* and the trustee, and not as between *cestui que trusts*, although under an express \*trust, where some have received to the exclusion of others; but the contrast between the 24th and 25th sections points, I think, to the opposite conclusion. The case between the *cestui que trusts* would have fallen within the 24th section if uncontrolled by the proviso. That section furnishes the general rule as to equitable estates, and the proviso being general, it is reasonable, I think, so to construe it

as to except, where there is an express trust, all the cases which would otherwise have fallen within the general rule. The reasonableness of this construction appears more strongly, when we consider what would be the remedies in the case of an express trust. If the right against the trustee is preserved, as it undoubtedly is, there would be the consequent right to a receiver, and how could the right to a receiver be maintained if the section be construed to create a bar as between the *cestui que trusts*? I do not see how in that case the land or rent could be recovered at all. Besides, it is not very reasonable to suppose that the remedy was intended to be preserved against the trustee, but destroyed against the persons who had received the benefit of the breach of trust. I think, therefore, that the construction of the statute contended for by the appellants cannot be maintained, and that the appellants' case fails upon the point of the Statute of Limitations. The authorities seem to me to be very strongly in favour of that conclusion. I may refer to *Ward v. Arch*, (a) *Young v. Lord Waterpark*, (b) *Cox v. Dolman*, (c) and *Garrard v. Tuck*, (d) The case of *Burroughs v. McCreight*, (e) cited by *Mr. Druce*, does not, I think, apply. In that case the trustee had not acted.

\* Failing this point upon the Statute of Limitations, the \* 443 defendants relied upon the general course and habit of the Court to refuse relief in the case of stale demands, but the rules upon this subject which apply to ordinary cases, if they apply at all, certainly do not apply with equal force, to cases of express trust. They are countervailed by the express duty incumbent upon the trustee to apply the trust funds according to the trusts. The Court, no doubt, in many cases, modifies the account against trustees where there has been a delay or acquiescence on the part of the *cestui que trusts*; and there may be cases, though I have not met with them, where the Court may have presumed a release or abandonment of the right by the *cestui que trusts*.<sup>1</sup> But in this case, whatever might have been said of the claim of the plaintiffs to rank *pari passu* with the six annuitants, a claim which arose, and as to which the plaintiffs were certainly put at arm's length very many years ago, the claim to come in under the trust, subject

(a) 12 Sim. 472.

(d) 8 C. B. 231.

(b) 13 Sim. 199.

(e) 1 Jo. & Lat. 290.

(c) 2 De G., M. & G. 592.

<sup>1</sup> *Perry Trusts*, § 745.

to the six annuitants, does not appear to have arisen ; nor could it arise, as it is admitted that the income has not been more than sufficient to answer the prior charges, and there has been no payment to Sir George Bowyer.<sup>1</sup> I see no ground, therefore, on which we can consider this claim to have been abandoned, and this ground of defence seems to me, therefore, to fail, equally with the defence founded on the Statute of Limitations.

A further objection was made on the part of the appellants to the title of some of the plaintiffs upon the ground that their interests were acquired by means of a purchase which was illegal and invalid, being affected by the laws relating to champerty and maintenance. It appears, that in the month of July, 1852, one of the three annuities, and a considerable share of another of them,

was purchased in the name of the plaintiff Tomkinson,  
 \* 444 \* and that this purchase was made in his name in trust as  
 to five-sixths for the solicitors of the persons who then  
 claimed title to the whole or some part of the rest of these annui-  
 ties, in a suit or suits in which the title to them was then in litiga-  
 tion. This part of the case cannot be stated more favourably to  
 the appellants than by referring to the declaration of trust exe-  
 cuted by the defendant Tomkinson ; for the parol evidence upon  
 the subject certainly does not tend to support the objection. The  
 declaration of trust that Tomkinson executed is as follows : [His  
 Lordship here read the memorandum of the 2d of August, 1852.]  
 I am of opinion that this objection on the part of the appellants  
 is also unfounded. Whether the purchase in question could be  
 maintained as between Bernard & Ralfe on the one hand, and the  
 purchasers on the other, is a question with which, in this case, we  
 have nothing whatever to do ; so far as the interests of the parties  
 are concerned, we are bound to consider it as valid until it is  
 impeached. In order to maintain the objection as an answer to  
 this suit, the appellants must show that the purchase was illegal  
 and void upon principles of public policy, upon grounds far higher  
 than the mere interests of the parties, and the appellants have  
 failed to satisfy me upon that point. The case of *Wood v. Downes* (*a*) was referred to in support of the appellants' argu-  
 ment upon that point, but all that was decided by Lord ELDON in

(a) 18 Ves. 120.

<sup>1</sup> See Lewin Trusts (5th Eng. ed.) 661 ; 1 Dart V. & P. (4th Eng. ed.) 363 ; Life Asso. of Scotland *v.* Siddal, 3 De G., F. & J. 72, 74, 77.

*Wood v. Downes* was, that the transactions in question in that case could not stand as between the client and the attorney; not that they were void *per se*, or that property which is in litigation could not be made the subject of sale and purchase. The cases abundantly prove that it may, and it does not seem to me that the mere relation in which the contracting parties stand can affect the validity of the transaction, \*otherwise than as \* 445 between those parties. I am aware of no rule of law which prevents an attorney from purchasing what anybody else is at liberty to purchase, subject of course, if he purchases from a client, to the consequences of that relation. I have not failed to observe that there is in this case, in the purchase-deed, a covenant by the purchasers to indemnify the vendors against future costs, nor have I failed to remember that, with reference to this covenant, the case of *Harrington v. Long*, (a) as reported, would seem to give countenance to the objection on the part of the appellants which we are now considering; but the report of *Harrington v. Long* does not show what the contract in that case was, and I agree in the observations made upon that case by the Vice-Chancellor WIGRAM in *Hunter v. Daniel*. (b) I am not prepared to hold that, if the purchase would be valid without the covenant of indemnity, the covenant of indemnity could render it invalid. The case of *Simpson v. Lamb*, (c) cited by Mr. Wickens, is distinguishable. There the purchase was by the attorney from the client of the subject-matter of the suit in which he was attorney. It is not so in this case.

It was further urged, on the part of the appellants, that the six annuities having priority over the three annuities in which the plaintiffs are interested, the plaintiffs could have no title to relief in this suit without repurchasing the six annuities; and that, at all events, the plaintiffs were bound to repurchase those annuities by the offer to that effect, which is contained in the prayer of the bill, and which is as follows: [His Lordship here read the offer.] These points have not appeared to me to be free from difficulty. The rule, no doubt, is general, if not \*universal, \* 446 that a mortgagee, whose title is not impeached, cannot be sued in this Court, except for the purposes of redemption. The question is, whether this rule, which thus applies to mortgagees,

(a) 2 Myl. & K. 590.      (b) 4 Hare, 420.      (c) 7 El. & Bl. 84.

applies also to annuitants whose annuities are repurchasable. I am not aware of any reported case upon this point, and the unreported case with which I have been furnished does not, I think, apply, as it does not appear that in that case the annuity was repurchasable, and, of course, in case of an annuity not repurchasable, a subsequent incumbrancer can only be put under the obligation of paying the arrears of the annuity. I may add that I am indebted to Mr. Leach, the registrar, for having made an extensive search into the registrar's books upon this subject, and that he has been unable to find any decision upon it. Looking, however, at the question on principle, I think that the rule which would apply in the case of an irredeemable annuity is also the proper rule to be applied in the case of repurchasable annuities. In the case of a mortgagee, the contract is that he shall be repaid his principal; and if default be made by the mortgagor, this Court gives him relief only upon the fulfilment of the contract, upon the payment of the full amount which is due. If the mortgagee enters into possession, he takes the rents towards the discharge, not of the interest only, but of the principal also; but in the case of a repurchasable annuity, there is no contract with the annuitant for the repayment of his purchase-money. It is at the option of the grantor whether he will repay it or not, and if the annuitant enters into possession upon default in payment of the annuity, he is entitled to hold only until the arrears of the annuity are paid; as was decided by Lord ELDON in *Jenkins v. Milford*. (a) To decide that upon default being made in

\* 447 payment of the annuity, the annuitant \* becomes entitled to be repaid his purchase-money, or that the grantor could in no case have relief in equity, except upon the terms of such repayment would be to introduce a new term into the contract between the grantor and the grantee. Independently, therefore, of the offer made by the bill, I think the plaintiffs could not be put upon the terms of repurchasing the six annuities.

Then, does the offer vary the case? This question must depend, as I think, in the first place, upon the effect to be attributed to the offer; whether it is to be considered as vesting in the defendant an absolute and independent right to insist that no relief shall be given except upon the terms which are offered, or is to be considered merely as giving power to the Court to enforce against the plaintiffs the terms which are offered, if the Court, in the exercise

(a) 1 Jac. & W. 629.

of its discretion, shall think fit to do so. Upon this point it is to be observed, that the question is not, as it was in *Knebell v. White*, (a) and *Inman v. Wearing*, (b) whether the Court will give relief to a party who does not offer to submit to such terms as the Court may consider to be just and equitable; but the question is, whether the Court is under the necessity of imposing upon the plaintiffs the terms which are offered, whether in its judgment they are or are not equitable and just. It is to be observed, also, that this is not a mere question of continuing an interlocutory order for a receiver, as in *Bazzelgetti v. Battine*: (c) a case in which the mere fact of the cross-bill having been filed may well have been considered as a sufficient ground for the continuance of the order, and in which, after a diligent search in the registrar's office, no entry of the decree can be found, although there is an entry in the \*minute-book of the dismissal of the bill, but whether \* 448 in both suits, or in one only, does not appear. It is to be observed, further, that in some early cases parties were in some instances held to be bound, and, in other instances, were held not to be bound by offers of this description; and that in *Pelly v. Wathen*, (d) the Vice-Chancellor WIGRAM intimated at least a doubt whether it was obligatory on the Court to enforce the offer which had been made in that case. It was not necessary, however, in that case to decide the point. Being called upon now to decide it, my opinion is, that it is in the discretion of the Court whether the offer shall be enforced or not.<sup>1</sup> I think it would be unreasonable that the Court should be bound, under all circumstances, to give effect to a proposal which it deems to be unjust. In this case the offer, as it stands upon the bill, is to pay for an annuity for the life of Sir George Bowyer the same price as would have been paid for it forty years ago. I think these are terms which it would be unjust to enforce against the plaintiffs. If indeed, the defendants had in the first instance accepted the offer, it might well have been that the Court ought to have held the plaintiffs bound by it, for then it might justly have been said that the defendants had been misled by the offer. But the defendants have not taken this course; they have throughout resisted the right of the plaintiffs, and resisted it as fully as they could have

(a) 2 Y. &amp; Coll. 15.

(c) 2 Swans. 156, n.

(b) 3 De G. &amp; S. 729.

(d) 7 Hare, 351.

<sup>1</sup> See 1 Dan. Ch. Pr. (4th Am. ed.) 387.

done if there had been no such offer contained in the bill; and, under these circumstances, my opinion is, that they are not entitled now to insist on being paid the repurchase price of their annuities.

The next question is, as to the 9560*L.* mortgage. The decree of the Master of the Rolls as to this mortgage provides as follows : [His Lordship here read the \* material parts of the decree which related to this point.] These directions are objected to by the appellants upon the grounds that Henrietta Lady Bowyer, under whom the appellant George Bowyer has become entitled to the mortgage, was a purchaser for value of Sir George Bowyer's reversionary interest in the mortgage, without notice of any right or claim upon it in respect of the annuities in which the plaintiffs are interested. The facts which are necessary to be stated as to this part of the case appear in the 23d volume of Mr. Reavan's Reports, at pages 619 and 640. [His Lordship here stated the facts bearing upon this point, and proceeded as follows:] That Henrietta Lady Bowyer was a purchaser for value of Sir George Bowyer's reversionary interest in this mortgage, I entertain no doubt; and the question, therefore, is reduced to a question of notice. Now, that Lady Bowyer knew that Bridger was in the receipt of the rents of the estate, and in receipt of them on behalf of annuitants, seems to be clear upon the evidence. Her agent, Curtis, attended the audits, and received from Bridger the income which was coming to her from the estate, giving receipts as for moneys received from the grantees of annuities. Having this knowledge, I think she was bound to inquire into the right of Bridger, by whom the rents were received. The cases fully establish that purchasers are bound to make inquiries of occupying tenants as to their rights, and are affected by notice of those rights if they fail to make such inquiries; and I do not see upon what principle it can be held that inquiry must be made of an occupying tenant, but that if a stranger be found in the enjoyment of the estate no inquiry need be made of him. To hold that such inquiry must be made is not, as I think, any extension of the doctrine of constructive notice, which certainly I am by no means inclined to extend. The rule upon this subject is thus laid down

\* 449 \* by Sir JAMES WIGRAM, who was very conversant with these questions of notice: "If a person knows that another has or claims an interest in property, he, in dealing for that property,

is bound to inquire what that interest is : " *Gibson v. Ingo.* (a) The principle is here broadly, but not, I think, too broadly, laid down, and it seems to me to reach the present case. Taking Lady Bowyer, then, to have been bound to make this inquiry, it is said that had she made it, the answer would have been that Bridger was in receipt of the rents on account of the six annuitants, and not of the three. Had the inquiry been made, and such an answer given, it is possible that Lady Bowyer might not have been affected by any further notice, but I do not mean to give any opinion upon that point. The fact is, that no inquiry seems to have been made, and I do not see my way to assume that, had the inquiry been made, the answer which is suggested would have been given. In the absence of inquiry, I think we are rather bound to assume that Bridger would have done what it would have been plainly his duty to do, have stated all the facts which would have shown that he was receiver and trustee for all the annuitants, and not for the six only. I think, therefore, that Lady Bowyer must be considered to have had notice of the annuities in which the plaintiffs are interested, and, of course, of the deeds by which those annuities were granted, and the covenants of Sir George Bowyer contained in those deeds. Having taken with such notice, neither she, nor the defendant George Bowyer claiming under her as a volunteer, can set up this mortgage against the annuities. It was contended, indeed, on the part of the plaintiffs, that the decree in this respect should have gone further, and should have fixed a trust upon the mortgage for the benefit of the plaintiffs. But I agree with the Master of the Rolls \* that this would be going too far ; it \* 451 would be to treat the reversionary interest in the mortgage as having been made a security for the annuity, which it was never intended to be. The case of *Barnhart v. Greenshields,* (b) was referred to in the course of the argument upon this question of notice. It does not seem to me to affect the present case ; but I take this opportunity of observing, that I quite concur in the explanation there given of what fell from me in the case of *Bailey v. Richardson.* (c) It was not my intention in that case at all to extend the doctrine of *Daniels v. Davison* (d) and *Allen v. Anthony.* (e)

(a) 6 Hare, 124.

(d) 16 Ves. 249.

(b) 9 Moore, P. C. 32, 33.

(e) 1 Mer. 282.

(c) 9 Hare, 734.

The only further point on which it is necessary to remark arises on the appeal of the defendant Edward Kynaston Bridger, on whose behalf it was insisted that the account was improperly directed against him. On this point it is sufficient to say, that he admits rents in his hands to the amount of 372*l.* 10*s.*, and must, of course, account in respect of them.

Upon the whole, therefore, I agree in the very careful and elaborate judgment of the Master of the Rolls, and am of opinion that these appeals must be dismissed; but, looking at the nature and difficulties of the case, and my learned brother not, as I believe, agreeing fully with me on all the points, I think they should be dismissed without costs.

THE LORD JUSTICE KNIGHT BRUCE.—The facts of this case render it, in my opinion, doubtful whether the suit is not \* 452 wholly for a demand barred by \* lapse of time, or too stale to be acted upon, and whether the bill filed, as it was, not before the year 1855, ought not to have been dismissed; nor am I convinced, that if there would have been error in dismissing it, the plaintiffs ought not to be held absolutely bound by the offer of redemption or repurchase which it contains, and be dealt with accordingly.

As to each of these points, however, the conclusion of my learned brother being the same as that of the Master of the Rolls, their united judgments (very likely, I need not say, to be right) must, of course, prevent the decree of his Honor from being varied here in either of the respects that I have mentioned. The view of my learned brother also is, that of the interest of Henrietta Lady Bowyer, acquired by purchase from the defendant Sir George Bowyer, she was not a purchaser without notice, and that accordingly her estate or assignee is not entitled to the benefit of it on that footing. As to this view, likewise (which is in accordance also, I believe, with the opinion of the Master of the Rolls), I entertain some doubt, a doubt unimportant, however; and the petitions of appeal must be dismissed.

**\* ASTLEY v. THE MANCHESTER, SHEFFIELD, AND LINCOLNSHIRE RAILWAY COMPANY. \* 453**

1858. May 7, 8. Before the Lord Chancellor Lord CHELMSFORD.

A railway company compulsorily purchased portions of the plaintiff's land for the purpose of a branch railway, but suffered their powers to expire without making it. Before the period of ten years, within which they were bound to dispose of superfluous lands, had expired, they promoted a bill for enabling them to make another branch railway, and proceeded to carry on works on the above portions of the plaintiff's land for the purposes of the proposed branch line.

*Held*, that the plaintiff's right of repurchase under the 128th section of the Lands Clauses Act had not arisen, for that the words "dispose of" in that section refer to a transfer of the land to some other person, not to its application to a new purpose.<sup>1</sup>

*Held*, further, that the abandonment by the company of the undertaking for which the lands were purchased, did not, independently of legislative enactments, give the plaintiff any right to a reconveyance.

*Held*, also, that the plaintiff had no equity to restrain the company from any user of the land not shown to be productive of irreparable injury to it.<sup>2</sup>

Whether the plaintiff would have had a right to restrain a user productive of such injury, *quære*.

THIS was an appeal from an order of Vice-Chancellor Wood, allowing a demurrer for want of equity to a bill filed by the plaintiff against the Manchester, Sheffield, and Lincolnshire Railway Company, praying that it might be declared that the plaintiff was entitled to repurchase and the company bound to reconvey certain portions of the plaintiff's land which had been previously purchased by the company under the compulsory powers of one of their Acts of Parliament, that the company might be decreed to reconvey the land to the plaintiff, and that until the reconveyance, the company might be restrained by injunction from carrying on any railway or other works on those portions of land.

The facts as stated in the bill were briefly these. The company in the year 1846 obtained an Act empowering them to make and maintain certain branch railways, called the Whaley Bridge and

<sup>1</sup> See *Lord Beauchamp v. Great Western Railway Co.*, L. R. 3 Ch. Ap. 745; 2 Dart V. & P. (4th Eng. ed.) 696-698; *Smith v. Smith*, L. R. 2 Exch. 282.

<sup>2</sup> See *Kerr Inj.* 646.

Hayfield branches, and to enter upon, take, and use such \* 454 of the lands therein \* specified, including certain portions of an estate of the plaintiff called the Dukinfield estate, as should be necessary for such purpose; and it was enacted, that the powers of the company for the compulsory purchase of land for the purposes of the Act should not be exercised after the expiration of three years from the 27th of July, 1846, and that the branch railways should be completed within five years from that day, and that, at the expiration of that period, the powers given to the company for executing the branch railways should cease, except as to so much of the railways as should be then completed. By a subsequent Act passed in 1849, the term limited for the exercise of the compulsory powers was enlarged till the 27th of July, 1851, corresponding with the period at which the railways themselves were to be completed.

Soon after the passing of the Act of 1846, the company compulsorily purchased from the plaintiff the portions of land in question for purposes of the Whaley Bridge Railway, and laid down a single line of rails upon them.

The bill stated that the Whaley Bridge Branch Railway was a work of great public utility, and particularly advantageous to the plaintiff in respect of the facilities of communication which it would have afforded to him as owner of the Dukinfield estate.

No portion of the Whaley Bridge Branch Railway was ever completed, and in the year 1850, the company took up the single line of rails from the portions of the plaintiff's land which they had purchased, and gave up their design of completing and entirely abandoned the Whaley Bridge Branch Railway, and they never

purchased and became unable to purchase any of the land \* 455 \* necessary for the construction of a considerable portion of that railway, nor had they ever done any act towards the construction of a considerable part of it.

In the session of Parliament held in the year 1857, the company applied for a bill to enable them to make branches, including a branch substantially corresponding with the Whaley Bridge Branch Railway, which had been abandoned. A petition was presented by the plaintiff against that bill, as a land-owner who was interested, and the defendants withdrew the bill.

In the session of 1858, the company promoted another bill to obtain the authority of Parliament for the construction of a rail-

way from Newton to Compstall, and the plans and sections which they deposited showed that they intended to use for the purpose of such proposed railway the lands purchased by them from the plaintiff. The plaintiff's bill alleged, that the line of railway proposed by the defendant's bill was only an unimportant portion of the Whaley Bridge Branch Railway, not affording to the plaintiff the same advantages as the abandoned line, that it was an undertaking of an entirely different character, and one for which the defendants would not have been entitled to have required the plaintiff to have sold to them his land under the powers of the Act of 1846. The plaintiff by his bill further alleged, that the company had very recently and under the pretence of completing the railway on the plaintiff's land under the expired powers of the Act of 1846, sent a large number of workmen to recommence the formation of a line of railway on the portions of land in question, not with a view to the construction of the Whaley Bridge branch, but as a part of the line of railway proposed by the bill pending in Parliament. The plaintiff charged by the 18th paragraph of his bill, \* that the company "had no right or authority \* 456 to take and compel the plaintiff to sell and convey to them the said portions of his said land, except for the purpose of enabling them to construct their said Whaley Bridge Branch Railway, and that as they have abandoned the intention of carrying out, and are no longer able to carry out, the purposes for which alone they were empowered to take the said portions of the plaintiff's land, the plaintiff is entitled to require them to reconvey the same to him upon payment of the present value, or upon such other terms of repurchase as this Honorable Court shall deem just, to which terms the plaintiff is willing and hereby offers to submit." The prayer of the bill was to the effect set out above, and concluded with the usual prayer for further relief.

*Mr. Daniel* and *Mr. F. J. Wood*, for the appellant.—The company having abandoned the undertaking for which the plaintiff was compelled to sell them his land, we submit that, apart from the 127th and 128th sections of the Lands Clauses Act, an equity arises to oblige them to reconvey it. It was urged before the Vice-Chancellor, that such equity, if it existed, must be mutual, and that if the plaintiff has such a right, the company must have a right to compel a land-owner to repurchase land which they do not

want. That we submit is not so. There must be mutuality in matters of contract, but there is none in matters of tort; to give a company such a right as is supposed would be to allow them to profit by their own wrong. Then the Vice-Chancellor thought, that the abandonment of the undertaking gave the plaintiff no ground of complaint, as he had received the full compensation for his land, but it must be borne in mind that part of the compensation in fact was the making a line very advantageous to his estate, and that he has not received.

\* 457 [THE LORD CHANCELLOR.—Has it not been \* decided that a jury cannot take into consideration the benefit derived to the remaining land from making the railway ? ]

That no doubt is so on a computation of damages, but, we submit, that it may and ought to be taken into account in considering the equities between the parties on the abandonment of the undertaking, just as it would be taken into account if the company were negotiating for the purchase of the land.

[THE LORD CHANCELLOR.—The fact, that the company took Mr. Astley's land, gave him no right to compel them to make the railway. Must not the rights of the plaintiff depend entirely on the 127th and 128th sections of the Lands Clauses Act ? ]

If that be so, the company are interfering with those rights by disposing of the land within the ten years. They are applying to Parliament for power to make a new line. As to that line substantially they will be a new company, and in spirit the transaction will be a making over of the line to a new company. If there be any ambiguity in the word "dispose," the doubt, according to the settled rule, must be resolved in favour of the land-owner. The 127th section says "sell and dispose;" the 128th, which gives the land-owner the right of repurchase, only says "dispose of," thus showing that the legislature contemplated his right arising on a dissolution other than a sale. *Bostock v. North Staffordshire Railway Company* (*a*) supports the view that the company have no right to use the land for a purpose wholly unconnected with the

(*a*) 3 Sm. & Giff. 283.

purposes of their Act, and the observations of Lord CAMPBELL in *Reg. v. York and North Midland Railway Company* (*a*) are to the same effect. The decision in that case was reversed on appeal, (*b*) but the reasoning of Lord CAMPBELL on that point was, to a great extent, adopted by the Exchequer Chamber, (*c*) where it is

\* admitted that the company cannot retain the land for a \* 458 purpose not contemplated by their Act. The obligation on the land-owner was to sell his lands to the railway company for a particular purpose. The company have taken them, but do not want them for that purpose, and they are applying for an Act for a different purpose, and are using the lands for that purpose.

[THE LORD CHANCELLOR.—Are you not in substance asking for an injunction to restrain them from applying to Parliament for an Act? Will the Court grant such an injunction? Must it not be presumed that an Act will not pass unless it is for the public good?] ]

No doubt that is to be presumed, but a committee of the house is not so well adapted as a Court of Equity for taking care of private rights. The new railway might be a public benefit, but it would be a public benefit obtained at Mr. Astley's expense, if his land is to be used for it on the footing that it now belongs to the company. The objections of the Master of the Rolls, in *Cohen v. Wilkinson*, (*d*) are in favour of the landholder.

[THE LORD CHANCELLOR.—Those remarks, so far as regards the landholder, conflict with *Reg. v. York and North Midland Railway Company*, and are not therefore now of any weight.] ]

It is not necessary for us to rely on them; here the demurrer admits the allegation, that the company could not have compelled the plaintiff to sell them his land for the purpose for which they are now about to apply it, and having bought compulsorily for a limited purpose, they cannot be entitled in equity to act as if they had unrestricted ownership. If, therefore, the Court cannot give us an immediate right to a reconveyance, still, under the prayer for general relief, we are entitled to an injunction restraining the

(*a*) 1 El. & Bl. 178, 212.

(*c*) 1 El. & Bl. 871.

(*b*) 1 El. & Bl. 858.

(*d*) 12 Beav. 125.

company from disposing of the land, acquired for one purpose, to a \* purpose not authorized by the Act under which they acquired it. We do not say, that the company can be restrained from applying to Parliament, but we say that in such an application, we ought to be placed in the same position as if we were still owners of the land which the company has taken from us. *Agar v. Regent's Canal Company*, (a) and *Blakenore v. Glamorganshire Canal Navigation* (b) support our case.

*The Solicitor-General* (Sir H. CAIENS) and *Mr. G. L. Russell* for the company. — If the company had not *bond fide* bought the land for the purposes of their Act, but had under the colour of those powers, obtained it for some other purpose, it may be that a Court of Equity would relieve. If, again, the company, after buying the land *bond fide*, had abandoned their undertaking, and then, without any legitimate reason, commenced making such alterations as would make it come back to the land-owner at the end of the ten years quite a different thing from what it was when he sold it, there might be a title to relief, and the Vice-Chancellor appears to have thought that there would be. Neither of those cases is made by the present bill. There was a *bond fide* purchase for the purposes of a particular undertaking, and then an abandonment of that undertaking, there being no fraud or mistake, and no case of irreparable injury to the land being alleged. This bill can only be sustained by laying down the new principle, that if a person sells land knowing that it is to be applied to a particular purpose, he can have it back if circumstances so change that it is not and cannot be applied to that particular purpose. The bill cannot be

maintained on the statutory powers of repurchase, for the \* 460 ten years have not expired, and it is clear that the \* company have not disposed of the land in such a way as to accelerate the right of the land-owner. "Dispose" in the 127th and 128th sections evidently means "sell," for the legislature cannot have intended to authorize the company to part with land otherwise than for a money consideration. To construe the word as the plaintiff proposes would oblige the company to let the land lie waste and unemployed. What is complained of here by the plaintiff is in substance the application to Parliament for an Act

(a) Cited 1 Sw. 250.

(b) 1 M. & K. 183.

authorizing a different use of this land, and the Court will not restrain such an application. *Lancaster and Carlisle Railway Company v. The London and North-Western Railway Company.* (a) Now as to the use the company are making of the land, why are they not to be allowed so to use it? Can it be contended, that they are bound to let it lie idle during the ten years? There is no allegation in the bill that irreparable injury is being done to the land so as to prevent it being restored to the plaintiff (if ever he becomes entitled to repurchase it) in such a state as to be profitable to him. The case is just the same as if the company had proceeded to make the Whaley Bridge branch, after their parliamentary powers had expired; a shareholder or the Attorney-General might complain in such a case, but the land-owner could not. *Thorne v. Taw Vale Railway and Dock Company.* (b) The plaintiff's case therefore fails, both on the general ground of equity and on the right given to the land-owner by the Lands Clauses Act. The injunction asked is merely ancillary to the reconveyance to which the plaintiff has no right, and an injunction cannot, in a case like this, be granted as an independent relief.

*Mr. Daniel*, in reply.—The plaintiff, if not entitled to the specific relief prayed, \* is entitled, under the prayer for \* 461 general relief, to an injunction restraining the company from this unauthorized use of the land until they have obtained parliamentary powers for the purpose. It is said, that if the company were proceeding to make the Whaley Bridge line after their powers had expired, the plaintiff could not interfere, though a shareholder or the Attorney-General might. The case of *Thorne v. Taw Vale Railway Company* does not prove that; it only shows that an individual who sustains no damage but what is common to the public cannot sue; but here the plaintiff makes a case of special damage to himself; he has an individual interest. *Spencer v. London and Birmingham Railway Company* (c) illustrates this distinction. Assuming that in the circumstances of this case there is no right to have an immediate reconveyance, what is the position of the company as to the land in question? They have abandoned the undertaking; they can therefore only retain the land till the end of the ten years, during that period they are lawfully

in possession and have the usufruct of the land. They cannot, however, be considered absolute owners; when they have abandoned the undertaking it is their duty to take steps to effect a sale, for if they do not sell within the ten years, the land, under section 127 of the Lands Clauses Act, reverts in the owners of the adjoining land, without any payment. Immediately on the abandonment of the undertaking the plaintiff acquired an inchoate right to have the land back again, though, if the case depends solely on the provisions of the Lands Clauses Act, such right possibly may not become complete within the ten years. It is, then, an abuse of the powers of the company if within that period they spoil the

land, so that it can only be restored to the land-owner in a \* 462 totally different condition, \* loaded with permanent works causing irreparable injury to the inheritance. This is not a dealing with the possession, which would be lawful, but a dealing with the inheritance in a manner which this Court will restrain; and such relief may be had under the prayer for general relief, not being inconsistent with any part of the case made by the bill. *Hill v. The Great Northern Railway.* (a) The demurrer for want of equity, is, therefore, too wide, and ought to have been overruled.

The Lord Chancellor, after stating the case made by the bill and the nature of the relief specifically prayed, proceeded as follows:—

The bill contains a prayer for general relief, and I agree that the plaintiff is entitled to abandon, if he pleases, the specific relief which he prays for, and to contend, that on the facts which are stated on the face of his bill, he would at the hearing be entitled to some other relief in a Court of Equity under the prayer for general relief.<sup>1</sup> Therefore, I must take into consideration not merely his claim to the relief which he specifically prays for, but also whether the bill states such facts and such circumstances as warrant me in saying that it raises any equity in favour of the plaintiff. Now, I confess that during the whole of the argument I have not entertained any serious doubt of the propriety of the Vice-Chancellor's decision, that no equity arises on the facts stated

(a) 5 De G., M. & G. 66.

<sup>1</sup> 1 Dan. Ch. Pr. (4th Am. ed.) 377-379, and notes.

in the bill. Where a land-owner has been compelled to part with his land to a railway company, no particular relation arises between the parties from that circumstance. However beneficial it may be to him that the railway should be made, he has no right to compel the company to complete their undertaking.

\* This is clearly established by the case of *The York and North Midland Railway Company v. Reg.* (a) There being then no power in the land-owner to compel the company to make the railway, suppose they should altogether abandon the undertaking and apply the land taken under the powers of their Act to a different purpose than the making of the railway, has the land-owner any new right arising from this state of things, which he can enforce in a Court of Equity? The right must depend either upon the sections of the Lands Clauses Consolidation Act which have been referred to in the argument, or, if I may so express myself, upon an equity outside the Act. Now, in the first place, what are the rights which are conferred on a land-owner by the 127th and 128th sections of that Act? Those sections are introduced by a sort of recital as to their object: "And with respect to lands acquired by the promoters of the undertaking under the provisions of this or the special Act, or any Act incorporated therewith, but which shall not be required for the purposes thereof, be it enacted: [His Lordship then read the 127th section.] There is no doubt that the term "superfluous" used in this section means "more than are wanted for the undertaking." And it seems to import that the works have been commenced, that some land has been applied, and that it has been found that more land than is wanted has been taken. But I think that in the general introduction of these sections the expression "which shall not be required for the purposes thereof" is sufficiently large to embrace the case of an undertaking being abandoned. The 128th section provides, that "before the promoters of the undertaking dispose of any superfluous lands, they shall, unless such lands be situate within a town or be lands built upon or used for building purposes, first \* offer to sell the same to the person then entitled to the lands, if any, from which the same were originally severed." If the argument of the counsel for the plaintiff is right, that the plaintiff is entitled,

under the provisions of this Act, to his right of pre-emption under the 128th section, he cannot compel the company to allow him the exercise of that right before the expiration of the ten years, unless the company by some act of theirs have shown that they are about to sell or dispose of the land. Now it has been argued that there is to be found, from the acts of the company in applying to Parliament for a different line from the Whaley Bridge branch line, and intending to use for this new purpose a portion of the land previously acquired from the plaintiff, a peculiar equity which grows out of the circumstances and entitles the plaintiff to insist that the promoters of the undertaking are, in point of fact, disposing or attempting to dispose of the superfluous lands upon which the right of pre-emption operates. But it seems to me that this construction of the word "dispose" cannot be maintained; the Act clearly contemplates by the use of this word the transfer of the land to some other person, not the application of it by the company to a new purpose. The plaintiff therefore can have no right to a reconveyance of the land under the sections of the Lands Clauses Consolidation Act which relate to superfluous lands.

Then, it was said, that these clauses have nothing to do with the present question, that the plaintiff is entitled to a reconveyance wholly irrespective of these clauses; he asserts that when the company have acquired land under the compulsory powers of their Act, and have abandoned the undertaking, an equity immediately springs up in the land-owner to entitle him to require that his land should be reconveyed to him by the company. I was

surprised at the assertion of an equity of this extraordinary

\* 465. \* character, and asked for some authority in support of it,

but none was produced. Such an equity, if it exist, must be reciprocal, and if a land-owner has a right to claim a reconveyance of his land, the company ought to have a corresponding right, when they abandon the undertaking, to call on the land-owner to take back his land, and to return them the purchase-money.

Then it was urged on the question of general relief, that the conduct of the company is an abuse of the powers conferred upon them by the legislature, and that their application to Parliament under the circumstances stated in the bill was an evasion of the powers which were intended to be conferred upon them, or was an abuse of those powers affecting the rights and interests of the

plaintiff in such a manner as to entitle him to apply to a Court of Equity for relief. I am quite unable to follow this argument. It is clear, that supposing a land-owner can complain of any peculiar injury which he has received from the acts of the company, he may come to a Court of Equity to restrain those acts, but I cannot understand how the application to Parliament, which it is admitted could not be restrained, there being nothing in the way of trust or confidence in the company which would hinder such an application, can authorize a Court of Equity to interfere and restrain them. How can their application for a bill, which may, if it passes into law, enable them to use this portion of the land which they obtained under the powers of the Act of 1846, for a different purpose and a different undertaking, entitle the plaintiff to say that he has sustained or is likely to sustain such injury and damage as gives him a peculiar interest, and a right to relief under his prayer for general relief different from and in substitution of that specific relief which is asked for by the bill ?

\* It appears to me, upon all the circumstances, that the \* 466 plaintiff has wholly failed in establishing his right, and that he is not entitled to a reconveyance, either upon the prayer for specific relief, or upon that for general relief.

It is necessary, however, that I should advert to the other part of the prayer in which the plaintiff insists on his being entitled to an injunction to restrain the company from further carrying on or prosecuting any railway or other works upon or over these portions of his land. Now, it was well remarked in the course of the argument, that the injunction which was prayed for was merely ancillary to a reconveyance, and that if the plaintiff was not entitled to an immediate reconveyance, he was not entitled to have the lands remain *in statu quo* till the period arrived when his claim to a reconveyance might arise. What does the plaintiff ask ? The company are applying to Parliament for an Act to authorize them to use the land for a purpose different from that for which it was originally taken. The plaintiff has no right to restrain them from doing so,<sup>1</sup> but he wishes to obtain an injunction which will indirectly have that effect. Has he any right to such

<sup>1</sup> See Kerr Inj. 9, 558; Heathcote v. The North Staffordshire Railway Co.,  
2 Mac. & G. 109, note (2).

an injunction? The company are the owners of the land, they have not a mere right of possession as was contended by *Mr. Daniel*, but they are the owners, subject to a right which the plaintiff or some other person may have at the end of ten years to repurchase the land. I say, "the plaintiff or some other person," for the right of pre-emption is given by the Act to the person who at the end of the ten years shall be the owner of the lands from which the lands taken have been severed, and it may be, that the plaintiff will not at that time be such owner. How then can the plaintiff restrain the company from any user of the land,  
 \* 467 \* which is not actually or certainly injurious to him.

Whether, if the company were dealing with it in such a way as irreparably to injure it, the plaintiff would have a title to relief, as the Vice-Chancellor seems to have thought he would, I need not give any opinion; it is enough for the present purpose to say, that no such case is made by the bill, that the plaintiff's case is rested solely on his right to a reconveyance, that the injunction asked is merely subsidiary to that right, and that he has failed in establishing any case for the interference of a Court of Equity, either on that ground or on any equity arising out of the facts stated by his bill. I am of opinion, therefore, that the demurrer has rightly been allowed, and that the appeal ought to be dismissed with costs.

1858. March 10. April 21, 28. May 8. Before the Lord Chancellor Lord CHELMSFORD and the LORDS JUSTICES.

A vendor insisted on executing the purchase deed without the purchaser or any agent of the purchaser being present, and also insisted on the purchase-money being paid not to himself but to his solicitor or his solicitor's clerk, to neither of whom he had given any written authority to receive it. On the purchaser declining to complete the purchase in that mode, the vendor brought an action against him for the purchase-money: *Held*, that the vendor ought to pay all the costs of a suit instituted by the purchaser for the specific performance of the contract and for an injunction to stay the proceedings at law.

*Semble*, that there is no rule that the purchaser may in all cases require the pur-

chase deed to be executed in the presence of himself or his agent, and the purchase-money to be paid directly to the vendor, but that he may so require in the absence of special circumstances rendering a different course proper.<sup>1</sup>

THIS was an appeal from the decision of Vice-Chancellor KIN-DERSLEY granting an interlocutory injunction to restrain the appellant from proceeding in an action at law for the recovery of a sum of money agreed to be paid on the purchase of an estate by the respondent from the appellant.

Mr. Chaplin, the appellant, was (as executor of the late Alderman Harmer) mortgagee in fee of the property in question, with power of sale.

On the 15th of October, 1857, the respondent Mr. Viney signed the agreement for the purchase, and, the title having been accepted, his solicitors, Messrs. Temple & Windsor, on the 28th of December, sent a draft of the proposed conveyance to Mr. Steele, the solicitor of Mr. Chaplin, who approved of it on his behalf. A correspondence thereupon took place, of which the following are the material parts: —

“ 28th December, 1857.

“ Temple & Windsor to Steele.

“ We shall be prepared to complete these purchases on Wednesday next at three o'clock, and shall be obliged \* by \* 469 your procuring Mr. Chaplin's attendance at that time. We will forward the engrossment to-morrow.”

“ 29th December, 1857.

“ Temple & Windsor to Steele.

“ Mr. Giles has just been here to say that his money is in consols, which are now closed, and he cannot transfer till the 7th. We must therefore beg the favour of postponing the appointment for completion till Thursday, the 7th January, at three o'clock.

“ When we wrote yesterday we had not observed what you had said in your letter of the 26th; viz., that Mr. Chaplin was too unwell to leave home. We generally prefer to have the vendor present at completion, but as that may be inconvenient on the present occasion, perhaps you will permit our clerk to meet yours at Mr. Chaplin's, to see him sign the deeds.”

<sup>1</sup> See 2 Dart V. & P. (4th Eng. ed.) 601, 602; 1 Sugden V. & P. (8th Am. ed.) 563, 667, 668; 1 Story Eq. Jur. § 769 a.

“ 30th December, 1857.

“ Steele to Temple & Windsor.

“ Your letter of yesterday was not delivered at my office till five minutes to four in the afternoon, being after I had left for the day. I have made engagements relying on your own appointment to complete at three o'clock this day being kept. It seems there is no more certainty of the matter being completed than there was when the contract was entered into about three months since, which shows me that I erred in yielding to your client's wish not to pay a deposit. I must therefore request that if you wish any further delay you will send on by bearer a check for 180*l.* by way of deposit (being twenty per cent on 900*l.*), in which case the completion of the purchase may stand over till three o'clock on 7th instant, as requested by you.

“ It is my rule never to give unnecessary trouble to a \* 470 \* client, more especially when he is unwell, and therefore and also because the attestation by one of my clerks of Mr. Chaplin's execution of the conveyances will be perfectly sufficient, I am sure you will not blame me for saying you must be content therewith.”

“ 30th December, 1857.

“ Temple & Windsor to Steele.

[After stating circumstances which occasioned the delay.] “ We consider there has been no delay for which either we or our clients can be blamed. With respect to a deposit, we have no money in hand of Mr. Viney's, but will write him if you wish it. Without intending any disrespect to you, we beg to say we shall prefer to attest Mr. Chaplin's signature.”

“ 30th December, 1857.

“ Steele to Temple & Windsor.

“ Under no circumstances shall I allow Mr. Chaplin to execute the deeds in the presence of one of your clerks as long as I act as solicitor in the matter. As you have sent me neither the deposit or the deeds I consider you leave me to take such course as I may determine upon.”

“ 31st December, 1857.

“ Temple & Windsor to Steele.

“ The vendor was aware of a positive defect in the title, which he did not disclose in the particulars, conditions, or abstract.

He is the party in default. Our client, not unreasonably, finding there was likely to be delay in completing the purchase, invests his money in consols, which now happen to be closed for seven days to come. Surely the vendor, who has been the cause of the delay which occasioned the investment in consols, will not sue for his purchase-money if he is told he may \* have it \* 471 when consols re-open, and that in seven days. We were not aware that the investment was made till Tuesday last."

" January 1, 1858.

" Steele to Temple & Windsor.

" I have obtained Mr. Chaplin's execution of the deeds, and will delay taking any steps until after 7th instant."

" January 2, 1858.

" Temple & Windsor to Steele.

" In five letters to you we have expressed what perhaps might have been considered more than a wish to see Mr. Chaplin execute these conveyances. We are unable then to appreciate the motive for your obtaining Mr. Chaplin's execution without our being present. To prevent misunderstanding at last, we beg to say we require to see Mr. Chaplin re-execute, and to pay the purchase-moneys to him."

" January 5, 1858.

" Steele to Temple & Windsor.

" You are not entitled to see Mr. Chaplin execute the conveyance, and I have in my letters informed you that such will not be permitted. As to your new requisition that the purchase-money shall be received by him personally, I have also to inform you that it will not be complied with. I must beg you to favour me with a letter by bearer, stating whether or not your appointment for three o'clock on Thursday is to stand, that I may apprise Mr. Carew. (a) In the event of your declining \* to complete \* 472 then, and to accept my clerk's attestation to the execution of the conveyances by Mr. Chaplin, and to pay the purchase-moneys to me or my clerk, should I be absent, I regret that no course will be left me but to resort to legal proceedings, and beg

(a) This was a judgment creditor, whose concurrence in the conveyance was required.

to be informed in your letter by bearer whether or not you will accept service of process against Mr. Viney."

"January 5, 1858.

"Temple & Windsor to Steele.

"We assert that we are entitled to see the vendor execute and to pay our purchase-money to him.

"As you assert the contrary, let the following question be put to Mr. Hayes, Mr. Brodie, or any other gentleman at the equity or conveyancing bar to be agreed upon: 'Vendor of freeholds lives in London. Purchaser and his solicitors are willing to attend at his house or his solicitor's office, according to his (vendor's) wish, to see him sign deed and receipt, and to pay him the purchase-money. Vendor's solicitor does not wish this. He says it is sufficient if his clerk attests vendor's signature to deed and receipt. Is purchaser entitled to see vendor execute and to pay his purchase-money to him? Yes or no?

"If the answer be 'Yes,' then you to pay counsel's fee: if 'No,' then we to pay it.

"It is our intention to attend at your office on Thursday at three to complete, if possible. But it is not our intention to complete without seeing Mr. Chaplin and paying purchase-money to him, unless in the event of the proposed counsel's opinion being against us. If you should deem it advisable to take proceedings against Mr. Viney, we will accept service of process."

\* "January 6, 1858.

"Steele to Temple & Windsor.

"I am very much mistaken if it has not already been decided by judicial authority that a purchaser is not entitled to require that the vendor execute the conveyance in the presence of the solicitor or agent of the purchaser, or that the vendor personally receive the purchase-money. The practice in the profession is against such a right, and in the present case it clearly cannot exist, as the purchaser was, under the conditions of sale, bound to pay the purchase-money on 11th November last irrespective of whether or not the conveyance had been previously executed, and might then have been sued for it, which what has since taken place shows ought to have been done, and which would have avoided the delay, after all was ready for completion, and beyond the time

of your own appointment, consequent on your client having invested his money in consols, giving him a profit thereon of from 4 to 6 per cent, besides the advantage which he gets by the excess of rents over the interest which he is to pay. The course proposed in your letter of yesterday would only create further delay and unnecessary trouble."

The defendants having brought the threatened action, the plaintiffs filed the bill in the present suit, praying that the defendants respectively might be decreed specifically to perform the contract, and to execute or deliver duly executed by them respectively the conveyances already prepared, or other proper conveyances of the property to the plaintiffs, the plaintiffs being ready and willing and thereby offering to pay to the defendants the purchase-money, together with such interest thereon (if any) as in the opinion of the Court the plaintiffs ought to pay, and that Mr. Chaplin might be restrained from further proceeding with the action at law.

\* By arrangement the appeal motion was turned into the \* 474 hearing of the cause, and the arguments having been interrupted by the vacation, a further arrangement was made for the completion of the purchase in the interval without prejudice to the question between the parties, which was by agreement argued with reference to costs. The following is a summary of the arguments on all these discussions : —

*Mr. Glasse* and *Mr. Druce*, for the plaintiff. — The purchaser has a right to have his purchase deed executed in the presence of some one who may be accessible to him hereafter as a witness, and who will be able to prove not only the execution of the deed, but the payment of the purchase-money to the vendor. Nor could the purchaser be compelled to complete, by paying the purchase-money to the vendor's solicitor, without the written authority of the vendor, especially when the purchaser knew the vendor to be a trustee merely, so that the purchaser might have had to bear the consequences of a breach of trust, if he paid to any one but the trustee. There is no doubt an absence of authority on these points. But it is undisputed that a purchaser is not obliged to accept the execution of his purchase-deed by attorney: Sugd. Vendors & Purchasers ; (a) and this is a similar case in principle. What means

(a) 18th ed. page 453, and cases there cited.

has a purchaser of ascertaining the genuineness of the signature of the vendor, unless the purchaser or some one in whom he has confidence, and who is responsible to him, witnesses the execution? The same observation applies as to the vendor being of age and of sound mind.

\* 475 They referred to *Harman v. Johnson*, (a) *Ryle v. \* Haggie*, (b) *Sugd. Vend. & Purch.*, (c) *Wilkinson v. Candlish*, (d) *Hope v. Liddell*, (e) Lord St. LEONARDS's Handy Book. (g)

*Sir R. Bethell*, *Mr. J. Baily*, and *Mr. G. L. Russell*, for the defendant.—There is no equity to sustain this suit. It is in form a suit for specific performance. But in truth the agreement had been before the institution of this suit fully performed as far as the vendor was concerned. He had conveyed the purchased property to the purchaser. All that remained to be done was the payment of the purchase-money by the purchaser, and this the vendor is seeking to enforce by his action. That action affords the best means of settling the dispute between the parties, as the purchaser may of course safely pay the money to the plaintiff's attorney in it. But assuming that there was any necessity to come into chancery at all, the question of right must be determined in the vendor's favour. No authority can be produced to the effect that a purchaser may refuse to complete, unless he can pay his money into the hands of the vendor himself, and see him execute the deed. Such a rule would prevent business from being practically carried on. It might as well be said, that a tenant could refuse to pay his rent to the landlord's steward, and insist on the landlord's coming to receive it in person. If such a rule existed, how could a purchase be completed, when the vendor was abroad? It is said, that the vendor is a trustee only. But a trustee has as much right as a person treating on his own behalf to appoint an agent to receive money, and payment may be \* 476 safely and properly \* made to such an agent. According to the passage from Lord St. LEONARDS's work, relied upon by the plaintiffs, payment to a trustee's banker is a good payment,

(a) 20 L. T. 89.

(b) 1 Jac. & W. 234.

(c) 18th ed. page 549.

(d) 5 Exch. 91.

(e) 21 Beav. 183.

(g) Page 89.

if the trustee direct such payment to be made, and why may he not direct it to be made to any other agent?

They referred to *Ghost v. Waller*, (a) *Dart on Vendors and Purchasers*, (b) *Rowntree v. Jacob*, (c) *Hughes v. Morris*, (d) *Webb v. Ledsam*, (e) *Rowland v. Witherden*, (g) *Waugh v. Wyche*. (h)

*Mr. Glasse*, in reply.

Judgment reserved.

May 8.

THE LORD CHANCELLOR.—I cannot proceed to deliver my opinion upon the question which we are called upon to determine, without expressing my great regret at the amount of litigation which has taken place, and the consequent expense which has been unnecessarily, and I am compelled to add vexatiously, occasioned to the parties.

The purchase-money having been paid upon an understanding that it was not to prejudice the right to have the judgment of the Court, the parties are entitled to our decision, upon which, so far as they are concerned, nothing but the question of costs now depends. With respect to the defendant, he has ceased to be interested, even to this extent, for we have received his solicitor's assurance, that no demand for costs is intended to be made upon him.

\* The questions which we are called upon to decide are, \* 477 whether a purchaser has a right to insist upon having the conveyance attested by his solicitor or by a witness of his own selection, and whether he has also a right to require that the money shall be paid to the vendor personally or in his presence.

Upon these questions, as to which the Court was strongly pressed at one period of the argument to give an opinion in the abstract, there is very little in the way of authority to be found; the reason of which is obvious. Sales and purchases are generally conducted with mutual confidence, each party is anxious for the

(a) 9 Beav. 497.

(e) 1 K. & J. 385.

(b) Page 428 (3d ed.).

(g) 3 Mac. & G. 568.

(c) 2 Taunt. 141.

(h) 2 Drew. 318.

(d) 9 Hare, 636.

completion of the transaction, and unwilling therefore to interpose any unnecessary obstacles, and in general no necessity exists for any unusual precautions. Under ordinary circumstances, therefore, the purchaser's solicitor has no hesitation in accepting the conveyance though he has not witnessed its execution, or in permitting his client to pay the purchase-money to the solicitor of the vendor. But suppose circumstances should arise in which the purchaser may feel that he ought to be armed with the most complete proof of the transaction, is he entitled to make himself thoroughly secure, both as to the execution of the conveyance, and as to the receipt of the purchase-money? It is quite clear, that if the purchaser pay his purchase-money to a person not authorized to receive it, he is liable to pay it over again. It may, I think, be considered as established, that the possession of the executed conveyance, with the signed receipt for the consideration money indorsed, is not in itself an authority to the solicitor of the vendor to receive the purchase-money. The difficulty is to see how the purchaser can be safe at all times from the danger of paying his money to an unauthorized person, without the vendor being present, or having expressly \* given to the purchaser or his solicitor authority to pay it in a particular manner.

The text-books speak of a written authority, but how can the purchaser be sure that this is genuine? and at all events it may impose upon a purchaser a difficulty in the way of proof, to which he may have a right to object. It becomes, as was said in argument, a link in his chain of title, which may hereafter embarrass him, and which it may be said the vendor ought not to be permitted to force upon him. On the other hand, many occasions may be suggested in which it would be most unreasonable for the purchaser to require the presence of a vendor or of several vendors dispersed in various parts of the country, or where he may be presumed to have waived the right to insist upon the vendor's attendance when the purchase-money is to be paid, by negotiating for the purchase with a person who is not resident in this country. If the Court were to lay down a rule that the purchaser under all circumstances has this right, it might in many cases afford a party the means of escaping from his contract, as non-compliance with a requisition on which he is entitled to insist would be an answer to a bill for a specific performance. These are some of

the difficulties with which the subject is embarrassed on the one side or on the other, and which make me very unwilling to decide any abstract question with relation to it.

It will be sufficient for this case to say that if a purchaser has not the right in every case to insist upon the vendor being present when the purchase-money is to be paid, neither is a vendor entitled to refuse compliance with a request of this description when circumstances arise which are sufficient to justify it. It is not likely in the ordinary transactions between vendor and purchaser

\* that the attendance of a vendor will be vexatiously \* 479 required ; but I think that the purchaser ought to have the right in reserve, to be used whenever a proper occasion arises for its exercise.

Was it then reasonable and proper in this case that the purchaser's solicitor should insist upon Mr. Chaplin's executing the conveyance in his presence, and himself receiving the purchase-money ? I lay no stress upon the condition in the contract, that the purchase-money was to be paid to the vendor at the office of Mr. Steele, his solicitor ; neither is it necessary to consider whether Mr. Chaplin was or was not a trustee, although the cases show that where there is a trust a purchaser may incur considerable risk in paying to a solicitor for the trustee, for this is merely a question of degree. What I rely upon is the conduct of the vendor, and his solicitor throughout the transaction, which, in my opinion, was sufficient to raise in the mind of the purchaser's solicitor an impression that more than the ordinary precautions were necessary, and to justify him in requiring to see the vendor or to insist upon his taking a personal part in the completion of the purchase. The peremptory refusal of the vendor's solicitor to allow him to execute the conveyance in the presence of the purchaser's solicitor, with an intimation of his intention to bring an action for the purchase-money, was unreasonable and unnecessary. The requisition that the purchase-money should be paid to Mr. Steele or to his clerk was one which he clearly was not warranted in making, and the action, brought hastily and vexatiously, placed the parties in a position of hostility which justified every caution on the part of the purchaser's solicitor. And all this, followed up as it was by the determination of the vendor to refuse all access to him, and perseveringly to oppose every endeavour to tender him the purchase-

\* 480 money, justified the \* purchaser's solicitor in declining to act upon the message sent to him, and transmitted through various persons, that he was to pay the money to Mr. Steele, and in determining that he had no sufficient authority upon which, under all the circumstances, it would be safe and proper for him to rely.

I think, therefore, that the action in the Court of Exchequer was commenced without any necessity or justification, and that it ought to be restrained, that the injunction prayed for must be granted, and the defendant Chaplin must pay all the costs, both at law and in this suit.

THE LORD JUSTICE KNIGHT BRUCE.—It is not necessary, I think, for any purpose of this cause, to recognize or to deny the existence of any general rule applicable to the completion of purchases of real estate, such as that or either of those which, asserted by the plaintiffs, their opponents contend against. The particular facts of the present case rendered the action brought in Mr. Chaplin's name plainly unjustifiable in my opinion, unjustifiable I mean in equity, whether maintainable or not maintainable at law, and there was in my judgment good ground for filing the bill.

The line of conduct which, previously to the action, he and Mr. Steele had thought fit to pursue, gave Messrs. Viney and Giles, as I conceive, very clearly a right, even if otherwise (if independently of special circumstances they would not have had the right) to require more proof of Mr. Chaplin's execution of the conveyances than before the filing of the bill had been afforded, and to say that, at that time, neither Mr. Viney nor Mr. Giles was in default as to

the whole or any part of the purchase-money. Perhaps the \* 481 greater part of Mr. Steele's letter \* of the 5th of January (the day of the commencement, or the day next before the commencement of the action) was not in any sense justifiable. But however this may have been, the expression "or my clerk should I be absent" was plainly not so. It is, in my opinion, to be much regretted that he wrote that letter, and that a subsequent letter to Mr. Chaplin was returned by Mr. Chaplin unopened. But those gentlemen were not alone arbitrary towards the purchasers and their solicitors; they were that and something more.

I think that the costs of the litigation here, and a portion at

least, if not all, of those at law, should be paid by Mr. Chaplin, and that Mr. Steele should neither pay nor receive any costs.

THE LORD JUSTICE TURNER.—I also think the vendor must pay the costs of the suit and of the action. Before this bill was filed, an offer was made on the part of the purchaser to complete paying purchase-money, costs of action and interest to the day, if the vendor would attend and receive the purchase-money, and hand over the deeds in exchange. The offer was not accepted, and it must rest upon the vendor to show why it was not accepted.

The explanation given is this: that the vendor's solicitor was entitled to receive the purchase-money, either by virtue of his character as solicitor or by authority given to him for that purpose. The first of these propositions rests upon a question of law, the second upon a question of fact. As to the first, I take it to be settled, that a solicitor is not by virtue of his office entitled to receive purchase-moneys, even though he may have possession of the deed of conveyance, and it would be strange if he was, for it is no part of the ordinary duty of a solicitor \* to receive money \* 482 belonging to his client, and the deed of conveyance comes into his hands for a wholly different purpose. As to the second proposition, no written authority is produced, or as it would appear has ever been given by the vendor; it is said, that no such authority was asked for, but I think it was incumbent on the vendor asserting the authority of his solicitor to produce that authority.

The soundness of this position as to the right of the solicitor to receive the purchase-money may be tested thus. Suppose after the completion of the purchase, and after the purchase-money paid to the solicitor, the vendor should deny that it has been received by him, and should file a bill in this Court, claiming a lien on the estate for the unpaid purchase-money, what defence could the purchaser make? The receipt upon the conveyance would be no defence to him, he could not show that the law authorized the solicitor to receive, and his whole case would depend upon his proving that the solicitor was authorized to receive, a fact which he might have no means of proving.

I think, therefore, that the purchaser had the right of insisting, either that the vendor should attend and himself receive the purchase-money, or of requiring that there should be written authority to pay the solicitor, and the vendor not having attended, and

no written authority having been produced, I think that he must pay the costs of the suit.

Then, as to the action, it was brought before the expiration of the time for which the vendor by his solicitor had agreed to wait for payment of the purchase-money, and it was evidently brought

\* 483 in consequence of the purchaser having insisted that the vendor should re-execute \* the deed, and should himself receive the purchase-money. It was brought, therefore, in breach of an express agreement, and upon grounds which in part at least were in my judgment untenable. I think, therefore, that whether the purchaser was or was not entitled to insist upon the re-execution of the deed, the vendor must pay the costs of it.

Under these circumstances, it is not, I think, necessary for us to decide whether the purchaser was or was not entitled to insist upon the re-execution of the deed, but I do not hesitate to say, that in my opinion, where the purchaser requires the deed to be executed by the vendor, and attested by his own solicitor, that requisition ought not to be refused, unless there are special circumstances justifying the refusal. Whether there are special circumstances sufficient to justify refusal must depend in each case upon the particular facts. In this case, I have no doubt. I think that what I have here stated is well supported by the authority of Lord ST. LEONARDS in what he has said on the subject of mortgages. It was attempted on the part of the vendor to distinguish between the case of mortgages and of purchases, but I think that the distinction is in this respect unfounded.

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\* 484 \* *In re* The LONDON and EASTERN BANKING CORPORATION.

1858. May 1, 4, 6, 7, 24. Before the Lord Chancellor Lord CHELMSFORD.

The provisions of 7 & 8 Vict. c. 111, as to the bankruptcy of joint-stock companies, continue applicable to a company until its affairs have been finally wound up as regards its creditors, and it may therefore be adjudicated bankrupt under that Act after it has ceased to carry on business and has been dissolved by act of law.

After an order had been made under 11 & 12 Vict. c. 45, for winding up a com-

pany and official managers appointed, a creditor sued the company with a view of obtaining a judgment upon which to found an act of bankruptcy. The official managers appeared in the action and afterwards allowed judgment to go by default: *Held*, that though the action was irregular, as it ought to have been brought against the official managers, yet after judgment it was too late to take the objection.

By a Judge's order made in the action it was directed that the judgment, when obtained, should not be available for any other purpose than to make the company bankrupt: *Held*, that this order did not prevent the creditors, when judgment had been obtained, from being within the meaning of 7 & 8 Vict. c. 111, § 5, "in a situation to sue out execution," and that the judgment was a good foundation for an act of bankruptcy: *Held*, on the construction of the Statutes 7 & 8 Vict. c. 111, 11 & 12 Vict. c. 45, and 20 & 21 Vict. c. 78, that a valid adjudication in bankruptcy may be made against a company, though an order for winding up the company has been made and an official manager appointed before the company has committed any act of bankruptcy. The bankruptcy, however, does not, under such circumstances, divest the estate out of the official manager, but is available only for the purpose of appointing creditors' assignees to act as creditors' representatives in the winding up by the official manager.

THIS case came before the Court on two appeals. The first was a motion by the official manager, by way of appeal from a decision of the Vice-Chancellor WOOD, refusing an application that Sir Charles Forbes and others might be restrained from taking any further proceedings in an action against the company, or on their judgment obtained therein, or on a demand or notice given by them, for the purpose of making the company bankrupt. The second was an appeal by the official manager from a decision of the commissioner in bankruptcy confirming an adjudication in bankruptcy against the company.

The London and Eastern Banking Corporation was incorporated on 29th January, 1855, by letters-patent, \* granted \* 485 in accordance with the Act 7 & 8 Vict. c. 113. In March, 1857, an accountant was called in by the directors to investigate its affairs, and the result of the investigation was such that although the concern did not appear to be insolvent, it was considered unadvisable to continue the business, and payment was accordingly suspended on 11th March, 1857. On 25th November, 1857, Vice-Chancellor Wood made an order dissolving the company from that day, and directing it to be wound up under the Joint-stock Companies Winding-up Acts, 1848 and 1849, and on 21st December official managers were appointed. On 13th Janu-

ary, 1858, a creditors' representative was appointed in conformity with the provisions of the Joint-stock Companies Winding-up Amendment Act, 1857.

On the same 13th January, 1858, Sir Charles Forbes and others, who were the holders of a bill of exchange for 1000*l.* which had been accepted in June, 1857, by the manager of the corporation on its behalf, commenced an action against the company in the Court of Exchequer, under "The Summary Procedure on Bills of Exchange Act, 1855." The official managers took out a summons before a Judge in chambers for a stay of proceedings, and on 6th February, 1858, Mr. Baron MARTIN made the following order, "that the plaintiffs be at liberty to proceed, but the judgment shall not be available for any other purpose than making the company bankrupt."

(a) On 10th February judgment was entered up. On 18th March a notice, dated 12th March,

\* 486 \* 1858, addressed to the company, and requiring immediate payment of the judgment debt, was served upon Colonel Chadwick, who had been one of the directors. A duplicate of the notice was also on the same day left at the office in Threadneedle Street, where the company had carried on business. On 18th and 20th March duplicates of the same notice were served on the two official

(a) The 5th section of 7 & 8 Vict. c. 111, under which section the creditors were proceeding, is as follows: "And be it enacted, that if any plaintiff shall recover judgment in any action personal for the recovery of any debt or money demand in any of her majesty's courts of record, against any such company or body, or against any person duly authorized to be sued as the nominal defendant on behalf of such company or body, and shall be in a situation to sue out execution upon such judgment, and there be nothing due from such plaintiff by way of set-off, or which may be legally set off against such judgment, and such company or body shall not, within fourteen days after notice in writing served upon the said company or body by service of the same on a chief clerk or secretary or registrar of the said company or body, or (if there be no officer of such denomination) on any director of the said company or body personally, or by the same having been left at the head office for the time being of such company or body, requiring immediate payment of such judgment debt, pay, secure, or compound for the same to the satisfaction of such plaintiff, such company or body shall be deemed to have committed an act of bankruptcy on the fifteenth day after service of such notice: provided always, that if such execution shall in the mean time be suspended or restrained by any rule, order, or proceeding of any Court of justice having jurisdiction in that behalf, no further proceeding shall be had on such notice, but that it shall be lawful nevertheless for such plaintiff, when he shall again be in a situation to sue out execution on such judgment, to proceed again by notice in manner before directed."

managers. The official managers then moved before Vice-Chancellor Wood to restrain the judgment creditors from taking any proceedings on their judgment or notice for the purpose of making the company bankrupt, and on 29th March the Vice-Chancellor refused the motion. On the following day a motion, by way of appeal, was made before the Lords Justices, who directed it to stand over, the judgment creditors undertaking not to proceed in bankruptcy any further than adjudication. The amount due on the judgment not having been paid, secured, or compounded for, the judgment creditors on 21st April filed their petition for adjudication \* in the Court of Bankruptcy, and on 22d \* 487 April, the company was adjudged bankrupt. On 29th April, Mr. Commissioner EVANS, after hearing counsel on both sides, made an order confirming the adjudication. A motion by way of appeal from this decision now came on before the Lord Chancellor, together with the adjourned appeal motion from the decision of Vice-Chancellor Wood.

*Mr. Rolt, Mr. Hetherington, and Mr. Roxburgh*, for the official managers.—This case is not governed by that of the Royal British Bank. (a) We rely on four points: 1. We say that the statute which enables banking companies to become bankrupt does not apply to a company which has been dissolved. 2. That the judgment by means of which it is sought to make the company bankrupt was obtained in an action which was commenced at a time at which by the statutory law it was impossible to bring an action against the company. 3. That the judgment is one on which execution cannot be sued out, and that the non-payment of the amount is therefore not an act of bankruptcy. 4. That the assets are all vested in the official managers, and the company is forbidden by law to pay, therefore non-payment cannot be an act of bankruptcy. These are reasons against the legal validity of the adjudication, but, apart from these, we contend, that there are equitable reasons why the creditors should not be allowed to go on with their bankruptcy proceedings, supposing them valid at law.

The first Act which allowed joint-stock companies to become bankrupt is the 7 & 8 Vict. c. 111, which did not extend to banking companies, but was made applicable \* to them \* 488

by 7 & 8 Vict. c. 113. The 4th, 5th, 6th, and 7th sections of the former Act are the material ones. The 4th makes a declaration of insolvency an act of bankruptcy ; this indicates an intention to deal only with existing companies, not with companies already dissolved. The 5th section contains the act of bankruptcy on which the creditors here rely ; viz., non-payment after demand of a debt due on a judgment upon which the creditor is in a situation to sue out execution. The 6th section makes disobedience by the company to an order of Court for payment of money an act of bankruptcy. The 7th section provides for another act of bankruptcy, and is also applicable only to an existing company. No such proceedings as are mentioned in that section were taken or could have been taken here. Service of the fiat is directed in the 3d section in terms which cannot apply to a company which has already been dissolved. The whole scope of the Act points only at companies not dissolved, and the language of 7 & 8 Vict. c. 113, § 48, which brings within the former Act banking companies "carrying on the trade or business of bankers in England," points at a company existing as a company at a time of the adjudication. We do not contend that a mere stopping of payment would take a company out of the Act, but we say that a dissolution, after which the company no longer exists, must have that effect.

Next, we say, that the judgment was invalid, the action having been improperly brought against the company. Looking at 7 & 8 Vict. c. 111, § 5, and 11 & 12 Vict. c. 45, §§ 16, 19, 25, 50, 52, it is plain, that, after the appointment of an official manager, no action can be brought against the company : the official manager alone can be sued. *Steward v. Greaves.* (a) The 58th \* 489 section \* of the last-mentioned Act only preserves the rights of creditors, "except as is by this Act expressly provided." The 73d section seems to assume that there may be an action against the company ; it may have been intended thus to provide for the case of there having been no dissolution ; but, whatever may be the interpretation of that section, the implication from it is not sufficient to control the plain words of sect. 52, and it gives no power to commence an action against the company after the appointment of an official manager ; its words must be construed distributively, "commence" referring to the official

(a) 10 M. & W. 711, 718, 719.

manager only. The object of this section was merely to enable the official manager to learn what debts there are. The action, therefore, was improper and the judgment obtained in it being of no validity cannot be made the foundation of an act of bankruptcy. There was this further irregularity in the judgment, that it was taken by default, without there having been any service on the company.

Supposing, however, these difficulties to be got over, the judgment, in order to satisfy the Act, must be one on which the creditor is in a situation to sue out execution; but this is one on which the judgment creditors could not have taken out execution, for Baron MARTIN's order does not allow them to do so. That order cannot be construed as allowing execution to issue if necessary to make the company bankrupt; if such had been the intention, the order would have run, "but execution on the said judgment shall not be used for any purpose, but to make the company bankrupt." That our construction makes the permission given by the order of Baron MARTIN useless, is nothing to the point. The learned Judge made it for what it was worth, being pressed by the argument, that under 20 & 21 Vict. c. 78, § 7, such a judgment might be available. That section, even if \* incapable of \* 490 any other interpretation than that which the respondents put upon it, would not be sufficient to countervail the opposite tendency of all the other statutory provisions bearing on the subject; but it may be satisfied by holding it to apply to cases where, although creditors' representatives have been appointed, there has not been any appointment of an official manager.

Lastly, we contend, that the non-payment of a debt which nobody can lawfully pay is not an act of bankruptcy. In the case of the Royal British Bank, (a) the demand was one which might have been complied with, the company being clearly a subsisting company at the time, though it had stopped payment. Here the demand could not, for by sect. 82 of 11 & 12 Vict. c. 45, no payment can be made after the appointment of an official manager, except by the direction of the Master. Now, it is absurd, that the non-payment of a demand which there is no one who can lawfully satisfy should be an act of bankruptcy. In the case of the Royal British Bank, it was urged that the property had become the prop-

erty of the official assignee, and how could it be divested out of him? Here it has become the property of the official manager, how can it be taken out of him? Vice-Chancellor KINDERSLEY advertises to this distinction in that case. (a) The several modes of winding up companies cannot be worked together, and if a company has been dissolved under the Winding-up Acts, the provisions as to bankruptcy cannot apply. The demand of payment was improperly served, there being nothing in the Act to authorize its being served at a place which, though the last known office of the company, is not their office at the time of service. There

\* 491 is a marked contrast \* in the wording of sect. 3 of 7 & 8 Vict. c. 111, which relates to the service of the adjudication.

Supposing, however, that the creditors have a legal right to make the company bankrupt, there remains the question, whether there is not an equity to restrain their doing so. A winding-up order is now in the nature of a decree for the benefit of all the creditors. The creditors are parties to the proceedings under it, and the case is analogous to the ordinary one of creditors being restrained from suing an executor after a decree for administration. That bankruptcy proceedings should be instituted pending the winding-up is double vexation, which ought not to be allowed. The Court can restrain proceedings in bankruptcy, if the circumstances of the case render such a course proper. *Attwood v. Banks*, (b) *Perry v. Walker*. (c)

*Mr. Amphlett*, *Mr. Bagley*, and *Mr. E. MacNaghten*, for the judgment creditors.—The appellants say, that a dissolved company cannot commit an act of bankruptcy, but §§ 28 and 29 of 7 & 8 Vict. c. 111, show that the company was for this purpose subsisting, and that the service on Colonel Chadwick, who was its officer at the time of its determination, was good. *Davidson v. Cooper* (d) furnishes an argument in our favour on this head. The argument, that the judgment was irregular, cannot help the appellants. Supposing it bad for irregularity, it must be treated as good until set aside, but it could not be set aside, for such a slip as suing the company by name instead of the official manager is

(a) 3 Drew. 652, 653.

(b) 2 Beav. 192.

(c) 1 Y. & C. C. C. 672.

(d) 11 M. & W. 778.

no ground for setting aside a judgment, when the parties have appeared and not taken the objection. \* Moreover, we contend, that the 50th section of the Winding-up Act of 1848 is only directory, and was not intended to make an action against the company by name impossible. Where an absolute prohibition was intended, different language was used: see sect. 73. Then it is said that this judgment does not answer the requirements of 7 & 8 Vict. c. 111, § 5, for that execution could not have been sued out upon it, and in support of this the appellants refer to the order of Baron MARTIN, and to the 7th section of 20 & 21 Vict. c. 78. But that section allows an action to be carried on for the purpose of making the company bankrupt, and the Judge's order bears the same construction. Then they say, that we were wrong in substance in our action, that we had no right to sue the company, but ought to have sued the official manager, that a judgment against him could not have been a foundation for making the company bankrupt, so that if the adjudication is supported, we shall have obtained an advantage by proceeding in a wrong course. But 7 & 8 Vict. c. 111, § 5, answers this; for a judgment against the official manager would be against a "person duly authorized to be sued as the nominal defendant on behalf of the company," and, therefore, non-payment of the sum due on such a judgment would be an act of bankruptcy by the company. Then they say, that as an order had been made for dissolving the company, it was not at the time of these proceedings a company "carrying on the trade or business" of banking within 7 & 8 Vict. c. 113, § 48, and that, therefore, it does not come within 7 & 8 Vict. c. 111; but the case of the Northumberland and Durham District Bank, (a) shows that these words are not to be construed so strictly. The case of the Royal British Bank (b) is decisive in the present case. \* There the Court had assumed the administration of the estate, and appointed an interim manager, whose powers under sect. 20 of the Winding-up Act of 1848 are most extensive. The Lord Justice TURNER there lays down that the Court, before preventing creditors from proceeding in bankruptcy, must find an express statutory provision taking away their right to do so, and he disposes of the argument, that there cannot be an act of bankruptcy by non-payment of a debt

(a) *Supra*, p. 857.

(b) 5 W. R. 141.

which no one is at liberty to pay. In addition to what is there said, it may be urged, that it is not impossible that the debt should be paid. The Court could order payment of it, if the circumstances were such as to render that course expedient. The second proviso in 20 & 21 Vict. c. 78, § 1, shows that the legislature contemplated bankruptcy before a winding-up, and then follows a proviso contemplating bankruptcy after a winding-up order, and after the appointment of creditors' representatives. The appellants say, that this must have been intended to apply to the case of an act of bankruptcy committed before the winding-up order, and followed by an adjudication subsequent to that order, but there is no sufficient ground for this restricted interpretation, and the 7th section makes it clear, that bankruptcy after the appointment of an official manager was within the contemplation of the legislature. That the judgment was obtained after trading had ceased is no objection. *Ex parte Griffiths, Re Mostyn.*(a) The argument, that we are like creditors suing executors after a decree for an account, is fallacious. We do not contend that we can have the same remedies on our judgment as if it had been one obtained against a company carrying on business, but the bankruptcy proceedings founded upon it will give the creditors means of intervening in the winding up in a way more advanta-  
 \* 494 geous \* to themselves than they could otherwise do. There is, therefore, no equity to restrain the proceedings in bankruptcy, if regular and in conformity with the statute, which we submit they are.

*Mr. Daniel and Mr. E. Rodwell*, for the creditors' representative.

*Mr. Rolt*, in reply.

May 24.

THE LORD CHANCELLOR.—This case was originally brought before Vice-Chancellor Wood on a motion made on behalf of the official manager appointed to wind up the affairs of the company, to restrain Sir Charles Forbes and others creditors of the company from proceeding in an action which they had commenced, or upon a judgment which they had signed, for the purpose of making the

(a) 3 De G., M. & G. 174.

company bankrupt. The Vice-Chancellor, not having jurisdiction in bankruptcy, was not competent to pronounce any opinion upon the validity of the fiat, and therefore he confined himself strictly to the motion before him, and considering that he ought not to interfere if there were any ground of right in the creditors to proceed in bankruptcy, he thought the point sufficiently doubtful to induce him to refuse an injunction. The whole case now comes before me, both upon the validity of the fiat in bankruptcy and also upon the equity alleged on behalf of the contributories, through the official manager, to stay the proceedings, even if the validity of the fiat should be established. [His Lordship, after giving a short statement of the facts of the case, proceeded as follows:] —

On the part of the official managers the proceedings \* in \* 495 bankruptcy are impeached and the validity of the fiat questioned upon four distinct grounds.

1st. That the Act of Parliament by which companies are made liable to bankruptcy does not apply to companies dissolved by act in law.

2d. That the judgment on which the petitioning creditor's debt was founded in this case was the result of an action which did not lie against the company.

3d. That execution upon the judgment was restrained, and therefore it could not be used to occasion an act of bankruptcy.

4th. That all the assets of the company were vested in the official managers, and the company were prohibited by Act of Parliament from paying any debt, and therefore the non-payment of this judgment-debt could not constitute an act of bankruptcy.

The determination of these points and of the whole case will involve the necessity of a careful as well as an extensive examination of various provisions of Acts of Parliament, which, providing for different classes of persons interested in the transactions of joint-stock companies, and each regarding its own object primarily and, perhaps, exclusively, have made it occasionally difficult to reconcile them together. The 7 & 8 Vict. c. 111, was the first Act which passed for the purpose of winding up the affairs of joint-stock companies unable to meet their pecuniary engagements. This Act had in view, principally if not solely, the rights of creditors, and it furnished them with the machinery of a fiat in bank-

ruptey to compel the payment and satisfaction of the  
\* 496 \* debts and liabilities of the company. But though the legislature contemplated the final settlement of the affairs of a company through proceedings in bankruptcy, and this Act contains clauses for compelling a just contribution from the members of the company towards payment and satisfaction of its debts and liabilities, yet it makes no provision for the adjustment of the rights and claims of the shareholders and contributories *inter se*. This was left to be regulated by the Act of the 11 & 12 Vict. c. 45, which was passed, as its preamble states, for the purpose of giving further facilities for the dissolution and winding up of joint-stock companies. As the former Act had principally in view the rights of creditors, this appears to be mainly directed to the shareholders and contributories, the winding up of the affairs of the company under its provisions proceeding in general upon the petition of the contributories, and the official manager being intrusted with the duty of adjusting the rights and liabilities of the contributories amongst themselves. Whether these two modes of proceeding for winding up companies may be co-existent and in action together, though independent of each other, or whether the one which is first forestalls and prevents the other, is a question which must necessarily be considered in the present case. But assuming that under the Acts already mentioned it was intended to leave these two systems to run each its own independent course, a further question will arise, whether by the Act of the 20 & 21 Vict. c. 78, they were not brought to the same point and forced into mutual co-operation.

It is with these three Acts of Parliament that I have to deal in this case.

In the first place, then, does the Act which makes com-  
\* 497 panies liable to the bankrupt laws apply to companies \* dis- solved by law? It is argued on the part of the official managers, that the 7 & 8 Vict. c. 111, in all its provisions, clearly points to and only regards existing companies, and the 3d, 4th, 5th, 6th and 7th sections were referred to, and also the 48th section of the 7 & 8 Vict. c. 113, to show by their language that it was only with companies in existence, and carrying on their business with directors capable of doing acts which would constitute acts of bankruptcy, and officers upon whom notice of different pro-

ceedings might be served, that the legislature intended to deal. But it appears to me that a satisfactory answer was found to this critical application of the language of these sections, in the 28th and 29th sections of the 7 & 8 Vict. c. 111, which expressly provide, that notwithstanding the determination of any company incorporated within the meaning of the Act, by any other means than its determination by her Majesty, such company, and the persons who were officers thereof at the time of such determination, shall respectively be considered as subsisting and as continuing for all the purposes of this Act, so long and so far as any matters relating to such company shall remain unsettled. Now, the purposes of the Act are to wind up the affairs of joint-stock companies through the medium of a fiat in bankruptcy, and, therefore, the company and its officers have continuance for the purpose of all those acts and all those proceedings which may be necessary to lead up to this object.

But, secondly, it is contended that the judgment could not be used to work an act of bankruptcy, as it was entered up in an action brought against the company, which the petitioning creditors had no right to bring.

There can be no doubt that an official manager having been appointed before the action was commenced \* by Sir \* 498 Charles Forbes and others, by the 50th section of the 11 & 12 Vict., it ought properly to have been brought against him, the words "shall and lawfully may" being, in my opinion, obligatory. But this objection, which is merely a formal one (the action, though nominally against the official manager, being actually against the company), should have been taken at an earlier period, and it is much too late to urge it after judgment has been signed. In *Steward v. Greaves* the objection was raised by a plea in bar to the action. Had the defendant pleaded only *non assumpsit*, or let judgment go by default, he could never afterwards have been heard to object that a different party ought to have been sued.

It is, thirdly, urged on the part of the official managers, that the judgment was one upon which no execution could issue, and, therefore, that it was incapable of creating a debt which could serve as the foundation for an act of bankruptcy.

This argument proceeds upon the words of the 5th section of the 7 & 8 Vict. c. 111, which is confined to judgments upon which the plaintiff "shall be in a situation to sue out execution," and it

is alleged, that the petitioning creditors could not have sued out execution upon their judgment, as by Baron MARTIN's order it was not to be available for any other purpose than to make the company bankrupt.

But I draw a totally different conclusion from the terms of this order. It is observable, that not one word is said in it about restraining execution. The object is to leave the judgment available for the purpose of making the company bankrupt. If a power to issue execution was essential for this object, that \* 499 power must have been left, or the judgment could not have been available for the only purpose for which it was allowed to have any effect. It would completely defeat the intention of the order, if it were not to be capable of being used as a good foundation for an act of bankruptcy.

The fourth point is, however, the most important one, as it raises the general question, whether proceedings in bankruptcy, and for dissolving and winding up companies under the two Acts of the 7 & 8 Vict. c. 111 and the 11 & 12 Vict. c. 45, can be carried on at the same time by two separate and independent modes of action.

This question has never before been distinctly raised.

The Lords Justices in the British Bank case had no occasion to express any judgment upon it, as the act of bankruptcy in that case was, by relation, prior to the appointment of the official manager, and, therefore, the adjudication (which was the only point they had to consider) was valid, and could not be annulled, and whatever may be gathered to have been the inclination of Vice-Chancellor Wood's opinion, when this case was before him, as the question of the validity of the fiat was not within his competency to decide, it would not be right to allow it to have the weight of an authority. In considering the question, then, independently of any previous decision, it will be important to observe, that where the bankruptcy has taken place before any proceedings have been commenced under the 11 & 12 Vict. c. 45, the winding up of the affairs of the company is completely under the control of the assignees. By the 6th section of the Act, "in case a fiat shall have been issued against any company, no petition shall be

presented for the dissolution and winding up, or for the \* 500 \* winding up of such company under this Act, by any other person than by the creditors' assignees of the estate and

effects of such company." Where, therefore, the bankruptcy has preceded any petition for the winding up of the affairs of a company, no conflict of authority can possibly arise, because such petition can only be presented by the creditors' assignees, and, if they think proper to pursue this course, and an official manager is appointed, all the estate and effects of the company which were before vested in the assignees become, by the 30th section of the Act, absolutely vested in the official manager, and all the proceedings must then take place under the winding-up petition, and not under the bankruptcy. The real difficulty arises when, as in this case, the winding up has gone on to the extent of an official manager being appointed, before a step towards bankruptcy has been taken. Under these circumstances, by the 29th section of the 11 & 12 Vict. c. 45, on the appointment of the official manager, all the estate, effects, credits, and rights of action of the company become absolutely vested in him. All actions and proceedings are to be in his name. He is by the 70th section to pay all moneys received by him into the bank, to his own account, and he is intrusted with ample powers to get in the estate and to distribute it amongst the creditors, so as to make a final settlement of the affairs of the company. With these powers and duties, which leave no room for the intervention of any other hand to deal with the estate, I should have thought that the legislature, having made provisions for transferring the winding up to the official manager, where the company had been made bankrupt, intended that if the petition, and other proceedings under the Act, had preceded the bankruptcy, the affairs of the company should be wound up in this manner, and that no subsequent proceeding to make the company bankrupt should take place, there being \* nothing upon which the bankruptcy could operate, or \* 501 over which the assignees could exercise any power. But I should have felt very much pressed by the 58th section, which provides that, except as by the Act expressly provided, "nothing in this Act contained, nor any petition or order under the same for the dissolution and winding up of the company, shall extend or enlarge, diminish, prejudice, or in any wise alter, the rights or remedies of creditors, whether against the company or against any contributories of the same." Now it is nowhere expressly provided by the Act, that, after a petition or order for winding-up, no proceedings in bankruptcy shall be commenced against the

company, and the power to make companies bankrupt is one of the rights and remedies which creditors have against them. I should, therefore, have felt great perplexity and embarrassment how to reconcile the apparent intention to remove the estate of the company from the operation of bankruptcy on the one hand, with the reservation of the right to proceed in this mode, though of no conceivable benefit to the creditors, on the other, if the matter had rested on the two Acts of the 7 & 8 Vict. c. 111 and the 11 & 12 Vict. c. 45. But the recent Act of the 20 & 21 Vict. c. 78, relieves the question from some of its uncertainty, though not altogether from its difficulties. It seems to me to be quite clear, that by this Act the legislature contemplates, that proceedings in bankruptcy may be taken against a company after the other course of petition for winding up has been adopted. This can be made quite plain by reference to a few of its provisions. By the first section, which provides for the appointment of a creditors' representative, the whole proceeding is referred to a period after an order has been made for the dissolution and winding up

of the company, and by the 7th section, when any company \* 502 shall not have been adjudicated bankrupt, then, \* after the Judge or Master shall by advertisement have called on the creditors to appoint a representative, no such action as is mentioned in the Joint-stock Companies Winding-up Act, 1848, shall be commenced or proceeded with, otherwise than for the purpose of making the company bankrupt.

It may be asked of what use can it be to creditors to exercise this power, when all the estate of the bankrupt company is vested for distribution in the official manager? The answer is, that the creditors may derive considerable benefit through the medium of the bankruptcy. As I have already intimated, the object of the legislature by this Act seems to have been to make the two modes of finally settling the affairs of a company, by means of a bankruptcy, and through the machinery provided by the Winding-up Act, unite together into one system. For this purpose the creditors are to be brought in to take part in the winding-up, and are to be called upon by advertisement to meet for the purpose of appointing one or more person or persons other than the official manager to represent them in and about the proceedings, and it is expressly declared, that, from and after the issuing of the advertisement, all the creditors of the company shall be deemed parties

to the winding up. The representative so to be appointed by the creditors is, however, subject to the approval of the Judge or Master, who may reject him if he appear to him to be unfit, or may remove him at pleasure, and, therefore, in the selection of a person to represent them, the wishes or judgment of the creditors may thus be controlled and thwarted. But if they desire to be secure of a person to act as their representative, without their choice being subjected to any discretion but their own, they may proceed to make the company bankrupt, and then the assignees are by the first section of the Act to be deemed and taken to be, \* and are thereby constituted, the representatives of \* 503 the creditors for the purposes of the Act, and, of course, being statutably appointed, they are irremovable. Even if a representative has been previously chosen or appointed, his authority is immediately superseded by the appointment of assignees under the adjudication of bankruptcy against the company, and all the rights, powers, and authorities previously possessed by the representative become vested in the assignees. Here there is a ground upon which, even if the whole estate is removed from the operation of the bankruptcy, the adjudication may be beneficial to the creditors, but, whether this is so or not, the intention of the legislature appears to me to be too plainly expressed to allow of any other conclusion than that the fiat in the present instance, though obtained after the appointment of an official manager, is valid, and cannot be annulled.

But, assuming the validity of the adjudication, the question arises upon the equity asserted by the official manager to restrain the creditors from proceeding in bankruptcy, upon the principle on which the Court acts where there is a decree for administering assets, which is in the nature of a judgment for all the creditors and to enable them to be paid ratably, and one creditor will therefore not be allowed to proceed in any manner which will give him an advantage over the rest. But in whom is this equity vested? Clearly in the class who are interested in and entitled to the fund to be distributed. But in the present case the creditors all concur in the propriety of proceeding to bankruptcy, the parties who are urging the equity against them are the shareholders and contributories of the company through the official manager. If the creditors have a legal right (as I think they have) by the Act of Parliament to proceed in the way which they have preferred,

\* 504 how can I, from any \* sense of the inconvenience of the course which they have adopted, restrain them in the exercise of this right? But, upon a careful consideration of the case, there appears to me to be an equity of another sort, which arises out of the relation of the parties as established by the Act of the 20 & 21 Vict. c. 78, and which calls for and will justify the interference of the Court.

In order to render my view of the matter clear, it will be necessary to refer once more to the Act of the 11 & 12 Vict. c. 45. By the 30th section of that Act, as I have before mentioned, when an order for winding up the affairs of a company is made on petition by direction of the Court of Bankruptcy, all the estate and effects which were before vested in the assignees become vested absolutely in the official manager. There can be no doubt that under this section the whole power to collect the estate and distribute it, and to make a final settlement of the affairs of the company, is transferred to the official manager, and that the powers and duties of the assignees are completely superseded. Under this Act there is no provision made for the interference and control of the assignees in the winding-up proceedings, after they have parted with their power by pursuing the course of petitioning in the manner provided. It seems to me that the legislature, by the provisions in the Act of 20 & 21 Vict. c. 78, intended to place the assignees in precisely the same situation as they would have been upon a petition by them for winding up the affairs of a company under the 11 & 12 Vict. c. 45, but with a power of interference not given under the former Act, and with authority to join and concur and take part in all the proceedings in and about the winding up of the company. By the appointment of an assignee, therefore, after an order has been made for winding up a company, he is at

\* 505 once the creditors' representative, and they become \* parties to the winding up. The bankruptcy then is of no further avail than to clothe the assignee with authority to concur with the official manager in the proceedings in and about the winding-up of the company. I cannot think that it could have been intended that he should at the same time be left to pursue his own independent course under the bankruptcy, more especially when I consider the futility of his operations, divested as he is of all power over the estate and effects, the inconvenience which would arise from the clashing of the two authorities, and the ruinous expense

in which the affairs of the company would be involved by this double action. I have then come to the conclusion, that, although the fiat is valid and cannot be annulled, and although the creditors cannot be restrained in the bankruptcy proceedings upon any ground upon which the Court acts in creditors' or administration suits, yet that, under the provisions of the 20 & 21 Vict. c. 78, the bankruptcy being only available for a particular purpose, the assignees ought to be restrained from using the proceedings in any other manner than in their character of creditors' representatives to co-operate in the winding up of the affairs of the company by the official manager, and that to this extent, therefore, an injunction ought to be granted.

## \* DAVEY v. DURRANT.

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## SMITH v. DURRANT.

1858. May 26. Before the LORDS JUSTICES.

An accounting party having brought into chambers an account, with an affidavit in support of it, the plaintiffs summoned him to attend to be cross-examined on his affidavit. He attended, but refused to be sworn until his expenses as a witness were paid, and the Court held him entitled so to refuse. The plaintiffs then abandoned the cross-examination and filed interrogatories for his examination as an accounting party: *Held*, that they could not proceed with the interrogatories till they had paid him his expenses and costs incident to the attempt at cross-examination.<sup>1</sup>

By the decree made in these causes, an account was directed of what was due on the several incumbrances to which the estate in question in them was subject. In pursuance of this direction, Mr. Durrant, who was the principal incumbrancer, carried in an account of what was due on his security, with an affidavit by himself, and by Davey, the plaintiff in the first cause, in support of it.

On 9th March, 1858, the solicitor of the Misses Smith, who were the persons entitled to the equity of redemption and the plaintiffs in the second cause, served on Mr. Durrant a notice for him to be

<sup>1</sup> See 1 Dan. Ch. Pr. (4th Am. ed.) 796; 2 Ibid. 1380, 1602.

cross-examined before the chief clerk on his affidavit. Mr. Durrant attended, but refused to be sworn until he was paid 12*l.* 6*s.* for his expenses. It was not disputed that this was a proper amount, assuming him entitled to be paid at all. The Misses Smith contended that he, being an accounting party, was not entitled to be paid as a witness, and they refused to pay. He insisted on his objection, and they moved to commit him. On 22d March, the Master of the Rolls refused the motion, holding that Mr. Durrant was entitled to be paid before cross-examination.

The Misses Smith then filed interrogatories for the examination of Mr. Durrant on his account, and on 14th April the parties attended before the chief clerk for the purpose of settling \* 507 them. Mr. Durrant objected to the \* settling being proceeded with till he had been paid the expenses of his previous attendance to be cross-examined. The question was adjourned into Court, and on 17th April the Master of the Rolls held, that the Misses Smith, having led Mr. Durrant into expense by one course of proceeding, were not at liberty to abandon it and adopt another course to the same end, without paying the costs of the former proceeding. His Honor accordingly made an order declaring that Durrant was entitled to be paid the 12*l.* 6*s.* before the Misses Smith proceeded to settle the interrogatories, and ordering that the Misses Smith should pay Mr. Durrant the costs of the summons to settle the interrogatories and of the hearing in Court. The Misses Smith now moved to discharge this order.

*Mr. W. W. Cooper*, for the appeal motion, referred to the 61st of the General Orders of 3d April, 1828, and contended that, as there was no order for the payment of the 12*l.* 6*s.*, the Misses Smith were in no default, and were entitled to waive the cross-examination, and proceed against Mr. Durrant as an accounting party without treating him as a witness.

*Mr. Roundell Palmer* and *Mr. Baggallay* appeared for Mr. Durrant, but were not called upon.

Their Lordships said that the order of the Master of the Rolls appeared to them quite right, and the appeal motion was refused with costs.

\* In the Matter of the NORTHUMBERLAND AND \* 508  
DURHAM DISTRICT BANKING COMPANY  
and  
In the Matter of the JOINT-STOCK BANKING COMPANIES  
ACT, 1857.

1858. May 26. Before the LORDS JUSTICES.

Liquidators appointed to wind up a company under "The Joint-stock Banking Companies Act, 1857," ought, as a general rule, to be disinterested persons, and neither creditors nor shareholders.

THE leading facts of this case are stated in a previous report, (a) from which it appears that the liquidators, who had been appointed under a resolution for the voluntary winding-up of the company, had been continued by an order of the Vice-Chancellor. They were three in number, one was a shareholder, another a creditor of the company, and the third an indifferent person. The creditors, who had succeeded in their appeal from the Vice-Chancellor's order allowing the voluntary winding-up to continue, now applied to remove the liquidators.

*Mr. Glasse* and *Mr. W. D. Lewis* appeared in support of the application, but said that their clients would be satisfied with the present liquidators, if a fourth were added, who was an indifferent person and experienced in such business as the liquidators would have to perform in a case like the present.

*Mr. Baily* and *Mr. Giffard* opposed the motion, but after some discussion assented to the addition of *Mr. Coleman*, the accountant, as a fourth liquidator.

THE LORD JUSTICE TURNER.—I think that, as a general rule, the appointment of a shareholder to be a liquidator is improper, but in the \* peculiar circumstances of this case, \* 509 it seems to me that it may be desirable. If such an appointment is made, I think that an independent majority ought

(a) *Supra*, 357.

to be secured, and that will in effect be done in the present case, as the conflicting interests of the creditor and the shareholder will neutralize each other, and there will be two disinterested parties. I think, therefore, that as no objection is made to any of the present liquidators personally, and the appellants are satisfied with the appointment of Mr. Coleman, in addition to them, it will not be necessary in this particular case to remove any of them, though in general it is desirable that liquidators should all be disinterested parties.

The Lord Justice KNIGHT BRUCE concurred.

1857. December 22. Before the Lord Chancellor Lord CRANWORTH.

1858. January 13. Before the Lord Chancellor Lord CRANWORTH, Mr. Baron MARTIN and Mr. Justice WILLES. April 20. May 5, 8. Before the Lord Chancellor Lord CHELMSFORD.

Where an inhabitant of Jersey had been imprisoned there for serving upon another inhabitant process in an English action under the Common Law Procedure Act: *Held*, that the imprisonment was unlawful, and that the prisoner was entitled to be discharged on a *habeas corpus*.

Another prisoner who was detained in custody not only for the above cause, but also for debts under orders purporting to be made by the Royal Court of Jersey, obtained a *habeas corpus* on an affidavit stating that the orders were made when the Court was insufficiently constituted, and without affidavits of debt such as were required by the law of the island. It appeared, however, on the statements of the affidavit, that the prisoner had taken proceedings after the alleged irregularity had occurred: *Held*, that the Royal Court was not shown to have been insufficiently constituted, and must be assumed to be competent to judge of its own law, and that the prisoner was not entitled to his discharge.

The Court has authority to give to the functionary who brings up a prisoner in obedience to a writ of *habeas corpus* at common law the expenses of so doing, but not his general costs.

MR. W. R. ELLIS applied for a writ of *habeas corpus ad subjicendum* to be directed to the gaoler of her Majesty's gaol in the island of Jersey, and to John Le Couteur, viscount of that island, to

bring up before the Lord Chancellor the bodies of Grantham Robert Dodd, an English solicitor residing in Jersey, and John Benny Merrifield his clerk. In support of the application, a joint affidavit of Mr. Dodd and Mr. Merrifield was read to the following effect:—

That an action was brought by Mr. Dodd to recover 39*l.* 7*s.* 5*d.* due to him by one Walter Matthew Battus of Jersey, for work and labour done and performed by Mr. Dodd as an English solicitor, and for moneys lent and advanced and paid, laid out and expended by Mr. Dodd to and for Mr. Battus. That a full copy of Mr. Dodd's bill of costs was signed by him according to the statute, and duly delivered to Mr. Battus on the 15th of October, 1857. That a copy of a writ duly issued out of the Court of Common Pleas in England against Mr. \* Battus, at the suit \* 511 of Mr. Dodd, was served by Mr. Merrifield on Mr. Battus on Saturday the 8th of November, 1857, according to the request of Mr. Dodd. That Mr. Dodd had resided and practised as an English attorney and solicitor in the said island for upwards of seven years then last past, and that he had always taken out his annual certificate in England during that time.

That in the year 1853, an Act was passed in consequence of representations made by Mr. Dodd to Lord ST. LEONARDS (then Lord Chancellor), which authorized the appointment of commissioners to administer oaths in chancery for the Channel Islands, and that under that Act Mr. Dodd and two other English solicitors practising in Jersey had been appointed commissioners. That there were no commissioners in the said island appointed to administer oaths relating to any matters pending before the Courts of Common Law in England, and till within the last six months all such affidavits had been sworn before one of the twelve jurats of the island. That within the last six months the jurats had absolutely refused any longer to administer oaths on any kind of affidavit relating to matters pending before the English Courts.

That on Monday the 7th of December, 1857, the deponents were both arrested and imprisoned by John William Godfray, one of the sheriffs or denunciators of Jersey, by virtue of an "order of justice" in the French language, of which the following was a correct translation:—

"On the remonstrance made before justice by Mr. Walter Mat-  
[ 403 ]

thew Battus, exposing, that the remonstrant has resided above twelve years past in this island, that on the 28th day of November, 1857, or about that time Mr. John Benny Merrifield in the \* 512 employ as clerk of \* Grantham Robert Dodd, gentleman, delivered to the remonstrant a paper which he said to him was a summons or copy of a summons issued out of the Court of Common Pleas in England, to appear before the said Court at the instance of the said Dodd within twelve days of the said notice for the payment of the sum of 39*l.* 7*s.* 5*d.* sterling money of Great Britain, with 3*l.* 3*s.* sterling expenses and costs; that the said Merrifield is not legally authorized to make any signification or give any notices in this island, more particularly in direct contravention of the laws, franchises, and privileges of the inhabitants, who cannot be cited before any of the tribunals in England for a cause which has arisen in this island; that moreover in this case the said Dodd has been domiciled for several years in the island, and follows the profession of a lawyer, and is for the present detained in the public prison for debt, and that the pretended debt which he alleges to be due to him from the remonstrant, is for costs and attendances which he pretends were incurred by the remonstrant in this island; that the conduct of the said Merrifield and of the said Dodd is illegal and vexatious towards the remonstrant, and would cause him a prejudice, if by justice it was not remedied;—for these causes, and for the preservation of the right to whom it may belong, it is permitted to the said remonstrant (inasmuch as the said John Benny Merrifield and Grantham Robert Dodd have no landed property in the island, and are consequently persons expatriable) to make seizure of their persons, save to them to furnish security to represent themselves before justice at all times and whenever called upon under pain of answering to the judgment, and to the end that the said John Benny Merrifield and Grantham Robert Dodd should hear the order served by the said Merrifield on the said remonstrant declared illegal and void, and to see themselves or one of \* 513 them condemned to pay to the said remonstrant \* the sum of 50*l.* sterling by way of damages, the whole under pain or penalty of 60 sous fine, and all costs, losses, prejudices, and damages incurred and to be incurred, which will be effected by the viscount or by one of the denunciators, officers of justice, save reasons to the contrary. Given at St. Helier, the 5th day of Decem-

ber, 1857. E. L. BISSON, *Judge delegate.* JOHN WILLIAM GODFRAY, *denunciator.*"

That such order of justice was one of the mesne processes of the island, but that there was no law written or prescriptive nor was there any legally established custom which justified the arrest of a British subject upon any mesne process whatsoever for book debts or unliquidated damages of any description, not even if such British subject was merely a sojourner, and not domiciled in the island, and even known to owe book debts in the island, and to be about to leave the island.

That the order of justice in no case was legally issued without an affidavit having been made as to the facts, and showing that a debt was due and owing by the defendant to the plaintiff, but that in this instance no such affidavit was made before the said order of justice was signed.

That in no case could an order of justice be legally issued, except under the sign-manual of the bailiff, but that (there being at present no bailiff of the island) in this instance the order of justice was signed by a functionary termed the Judge delegate, and that he was only one of the twelve jurats, merely nominated by the states *pro tempore*, until the appointment of a bailiff by the Crown. That the Judge delegate had, however, no direct authority from the Crown, if even his nomination by the states was legal, which appeared from the best authority in the island to be very doubtful.

\* That the deponents were detained in custody upon the \* 514 said order of justice from Monday the 7th of December, 1857, until Saturday the 12th of December, when they were taken by the denunciator before the said Judge delegate, who was sitting in the Royal Court, that their arrest was confirmed by him, and that they were ordered to pay a fine of 20*l.* and costs jointly, and were again imprisoned for non-payment of such fine and costs.

That although it was stated in the order of justice, that Mr. Dodd was in Jersey prison for debt, it was any thing but the real truth, for that he was illegally detained there upon mesne process, no step having been taken in the action, nor any proof whatever produced in support of the claim for which he was so detained, nor was Mr. Dodd indebted to the party who gave directions for his arrest and detention to the amount of a single shilling; but that,

on the contrary, such party was indebted to him in a very considerable amount.

That Mr. Dodd would long since have applied to the English Courts for a *habeas* in consequence of the said last-mentioned false arrest, but that hitherto he had been entirely prevented from making such application to the Common Law Courts of England, simply from the fact of his being unable to be sworn to the necessary affidavits by the said jurats, and from there being no commissioner in the island to administer oaths upon affidavits to be made use of before those Courts.

That the deponents both made an affidavit relative to their said arrest upon the before-mentioned order of justice, and were sworn to that affidavit before a commissioner to administer oaths in chancery, and that the said commissioner certified that there was no one in the island but the chancery commissioners

\* 515 who were authorized \* and willing to administer oaths upon such affidavits. That upon such affidavit so sworn, application was made to Mr. Justice CROWDER at chambers on Saturday the 12th of December, 1857, and that the circumstances being explained to him, he allowed the affidavit to be read to him, but that, as that was the day on which the deponents were to be taken before the Court in Jersey, Mr. Justice CROWDER declined to order a *habeas* until he knew what the Court had decided. That immediately after the decision of the Court there, they made a further joint affidavit as to the order of the Court, and were again sworn before a chancery commissioner, he certifying to the same effect as before mentioned. That the deponents were informed and believed that an application was made to Mr. Justice CRESSWELL at chambers on Wednesday the 16th of December, upon such their second affidavit so sworn before a chancery commissioner, and that his Lordship refused the application on the ground of its not being sworn before a proper authority.

That the deponents were both still detained in custody, and had no means whatever of swearing an affidavit before any other authorized person to administer oaths in the island than a chancery commissioner.

*Carus Wilson's Case (a)* was cited.

The Lord Chancellor made an order for the writ to issue.

(a) 7 Q. B. 984.

1858. January 13.

The writ accordingly issued, and in pursuance of it prisoners were brought up on this day.

Mr. COLVILLE, the registrar, read the return of the viscount and gaoler to the writ.

\* It stated in effect that before the coming of the writ of \* 516 *habeas corpus* to the viscount and gaoler, to wit, on the 7th of December, 1857, Grantham Robert Dodd and John Benny Merrifield in the writ respectively named were severally arrested by John William Godfray, Esq., one of the denunciateurs of the Royal Court of Jersey aforesaid, by virtue of a writ termed in the island *ordre de justice*, which writ or *ordre de justice* was in the French language, and being translated into the English language was as follows. [The return set out the *ordre* as *ante*, p. 511.] That on the 7th of December, 1857, G. R. Dodd and J. B. Merrifield respectively were under and by virtue of the last-mentioned writ or *ordre de justice* brought by John William Godfray to and imprisoned in the said gaol, of which John De Rossignol was keeper as aforesaid.

That upon the 12th of December, 1857, G. R. Dodd and J. B. Merrifield respectively were taken by John William Godfray as such denunciateur as aforesaid before the Royal Court of the said island, when the following sentence or act in the French language was pronounced by the said Royal Court in relation to the said proceedings, that is to say:—

“ In the Royal Court of the island of Jersey, the year 1857, the 12th day of December, between Mr. John Benny Merrifield and Mr. Henry Cayzer, who remained security to represent the person of the said Merrifield at all times and whensoever, under pain of answering the judgment, and Grantham Robert Dodd, gentleman, of the one part, and Mr. Walter Matthew Battus of the other part, summoning them to be present at the confirmation as well of the arrest of the persons of the said John Benny Merrifield and Grantham Robert Dodd by the officer, by virtue of a certain order of justice as of the \* said order of justice itself to \* 517 them communicated, setting forth that the complainant has resided more than twelve years in this island.” [The order then contained recitals to the effect of those in the order already set forth at p. 511, *ante*, in the affidavit of the prisoners, and pro-

ceeded as follows.] "Concluding that the said Mr. John Benny Merrifield and Grantham Robert Dodd, gentlemen, may witness the summons served by the said Merrifield upon the said complainant declared null and illegal, and be condemned jointly to pay to the said complainant the sum of 50*l.* sterling by way of damages, the whole according to that which is set forth more at length in the said order under the penalties therein mentioned, and to hear the record of the officer read. Considering that the writ by virtue of which the said Mr. Dodd alleged himself to have acted issued out of a Court the jurisdiction of which does not extend to this island, the Court has declared the summons served on the said complainant by the said Merrifield, who acted by the orders of the said Mr. Dodd, illegal and null, has confirmed the arrest of the persons of the defendants, and has condemned them to pay jointly to the plaintiff the sum of 20*l.* sterling by way of indemnification, and also the expenses, and in their default of payment they are sent to prison; from which sentence the said defendants are allowed to appeal before the greater number considering such appeal: the plaintiff is allowed to protest in respect of all losses, prejudices, interests, and damages."

The return proceeded to certify that upon the last-mentioned sentence or act of Court being pronounced, and on the said 12th of December, 1857, John William Godfray, as such denunciator, and in pursuance of the said sentence or act of Court, took back G. R. Dodd and J. B. Merrifield to the said gaol.

\* 518 \* That the Royal Court of Jersey during all the time aforesaid had been and still was the principal Court of criminal and civil jurisdiction in the said island. That an appeal lies from the full Court of the said Court to the Sovereign in Council, and to no other authority or tribunal whatever.

That all acts and sentences of and in the said Court had been and were pronounced in the French language, and that such a sentence or act of Court as that lastly thereinbefore set forth and translated was a sufficient and lawful authority whereby and in obedience to which John Le Rossignol, as such keeper of the said gaol, was obliged and empowered to retake into his custody, and had been and was obliged and empowered to detain therein, G. R. Dodd and J. B. Merrifield as aforesaid; and that John Le Ros-

signol had retaken and detained them, and still detained them accordingly, in pursuance of the said sentence or act of Court.

That the above was the cause of the taking and detaining in custody, as in the said writ mentioned, of J. B. Merrifield, and one of the causes of the taking and detaining in custody, as in the said writ mentioned, of G. R. Dodd.

That G. R. Dodd was previously to the coming to them of the writ to the return annexed, and previously to the 7th of December, 1857, that was to say, on or about the 1st of January, 1857, arrested, as they believed, by the said denunciateur Godfray under and by virtue of a writ termed in the said island *ordre de justice*, signed by the then *bailly* of the said island (who was the principal judicial functionary in the said island, and by virtue of his office President of the said Royal Court), at the suit of William Foster Attwood and Caroline \* Henrietta Croome his wife, \* 519 in respect of the claim or demand mentioned in the sentence or act of Court next thereafter set forth. That G. R. Dodd was thereupon and on the 24th of January, 1857, taken before the Royal Court in pursuance of the last-mentioned writ or *ordre de justice*, and thereupon imprisoned in the said gaol under and by virtue of the following sentence or act of the said Royal Court:—

“ In the Royal Court of the Island of Jersey.

“ The year 1857, the 24th day of January.

“ Upon the action brought against G. R. Dodd, gentleman, by Mr. William Foster Attwood and Mrs. Caroline Henrietta Croome his wife, to receive judgment of Court, as well in respect of the seizure of his goods, furniture, and debts due to him, as in respect of the arrest of his person by the officer by virtue of justice communicated to him, setting forth that in the month of August, 1857, or about that time, the plaintiffs appointed G. R. Dodd, gentleman, conjointly with Mr. William Lewis, trustees or *fidei commissaires* of a landed property belonging to the female plaintiff, situate in the county of Northampton in England; that the said trustees have disposed of and sold the said property, and the said Mr. Dodd has received on account of the plaintiffs, the sum of 833*l.* 15*s.* 8*d.* sterling money of Great Britain, of which he retains the greatest portion, refusing to give a good and faithful account of it to the plaintiffs and to pay them that in respect of which he is indebted

to them, and concluding that, forasmuch as the said Mr. Dodd is expatriable, it be permitted to cause to be seized his goods, furniture, and debts due to him, and seeing that the said furniture and debts are not sufficient to satisfy the demand of the plaintiffs, to cause his person to be arrested to compel him to pay the

\* 520 above-mentioned sum of 833*l.* 15*s.* 3*d.* sterling, less \* whatever the said Mr. Dodd shall prove that he has well and justly paid on account of the plaintiffs, and to pay them the sum of 20*l.* sterling by way of damages, reserving to the said Mr. Dodd to give security to represent himself before justice at all times and whensoever, under pain of answering the judgment, according to that which at greater length is set forth in the said order under the penalties therein mentioned, and to hear the record of the said officer read. The defendant, without prejudice to his right to claim damages, in respect of his illegal imprisonment, having at first pretended, with respect to the form of the action, that a trustee of a deed made and executed in England and relating to the property situate in England cannot be sued in Jersey for an account of the trust, and in no case can be arrested, such an arrest not being allowed in England. In the second place, the defendant has a co-trustee, responsible like himself, residing in England, and against whom the same action ought to be brought. That the plaintiffs therefore cannot sue him without first obtaining the appointment of a representative as regards property of the absent trustee. That, moreover, if the plaintiffs had grounds for their demand, they ought to have instituted a suit in the Court of Chancery against the co-trustee now in England and the defendant himself. That from the nature and object of the matter in litigation it can only come within the jurisdiction of the Court of Chancery, and, having demanded to be dismissed from the action, the Court, upon the request of the plaintiffs, has ordered that two documents or trust deeds produced by the defendant be deposited in the registry, so that they may examine them, and the case is postponed until Saturday next, the 31st instant; and the parties are commanded to attend accordingly; from which sentence the defendant is allowed to appeal at the end of the cause before the greater number, and he is sent back to prison."

\* 521      \* That other proceedings had been had and taken in the said last-mentioned suit or action not material to be therein

set forth, but that no act or sentence of the said Court had been made for the discharge of the said G. R. Dodd from custody. That the sentence or act of Court lastly therein set forth and translated was a good, valid, and sufficient authority for the imprisonment and detention of the said G. R. Dodd; and under and by virtue of such last-mentioned sentence or act of Court the said John Le Rossignol, as such keeper of the said gaol as aforesaid, detained and still detained the said G. R. Dodd in his custody, as he the said John Le Rossignol, gaoler, was by law bound and empowered to do.

The return then stated two other causes of detention, one of which was an arrest by virtue of a writ or *ordre provisoire*, signed by Edward Leonard Bisson, Esq., as Judge delegate, at the suit of Charles Francis Taroni, to the following effect:—

“ It is permitted by justice to Mr. Charles Francis Taroni to cause to be seized, arrested, detained, and even sequestrated, if necessary, the most apparent goods of his debtors in all places where they may be recovered, and particularly in substance, to be applied in payment of what shall be found to be well and justly due to him: as to foreigners or persons expatriable, he shall be at liberty to arrest their goods, vessels, merchandises, and effects, or themselves in person if they should not satisfy their engagement, written obligations, debts and promises, or if they do not give sufficient security to satisfy the same, which will be effected by the viscount or by one of the denunciators, officers of justice, or in their absence, as regards the said expatriables, by the constable or one of the *centeniers* of the parish. Reasons excepted. Given at St. Helier, this 31st day of December, 1857. E. L. BISSON, *Judge delegate.*”

\* The return further stated, that the said writ or *ordre provisoire* lastly therein set forth and translated was, as the viscount and gaoler believed, a good, valid, and sufficient authority for the imprisonment and detention of the said G. R. Dodd, and that under and by virtue of such last-mentioned writ the said John Le Rossignol, as such keeper of the said gaol as aforesaid, detained the said G. R. Dodd in his custody, and still detained him as he the said John Le Rossignol was as he believed bound and empowered to do when brought to him by an arresting officer of the Court.

*Serjeant Piggott* and *Mr. W. R. Ellis*, for the prisoners.—The Common Law Procedure Act (16 & 17 Vict. c. 76) expressly provides, that process may be served in any part of the world. The 227th section also provides, that Jersey shall not be considered beyond seas for the purposes of the Act. None of her Majesty's subjects can be justified in treating the service of process under this statutory provision as an offence. This is the only cause assigned for the detention of Mr. Merrifield. It is true, that other causes are alleged with respect to Mr. Dodd; they are equally unsustainable. The alleged breach of trust in the suit of *Attwood v. Dodd* is not established, and the general authority to Taroni to seize the persons of all his debtors is clearly illegal.

They referred to Bacon's Abr., (a) *Burdett v. Abbott*, (b) *Sheriff of Middlesex's Case*, (c) *Hooper v. Lane*, (d) Orders Henry 8th relating to the Island of Jersey, *Re Van Sandau*, (e) Code of Laws of Jersey confirmed in Council, 1771, *King v. Clerk*. (g)

\* 523     \* *Mr. W. W. Mackeson*, for a detaining creditor of Mr. Dodd, was not called upon.

*Mr. Sumner*, for the viscount and gaoler, asked for costs and the expenses of bringing up the prisoners, and referred to 31 Car. 2, c. 2 (the Habeas Corpus Act).

THE LORD CHANCELLOR. (h)—An application was made to me for a writ of *habeas corpus* under the common-law jurisdiction of the Court of Chancery before the Christmas vacation, on an affidavit which stated that Dodd and Merrifield were detained in custody in Jersey, having been committed under a warrant of the Royal Court of that island, the ground of their detention being that the one had issued and the other had served a writ of summons out of the Court of Common Pleas in this country. This was treated as an offence by the Royal Court of Jersey, and they were consequently imprisoned. This was the only ground mentioned to me for the issue of the *habeas corpus*, and I thought it

(a) Page 134 b, § 10.

(e) 1 Ph. 445.

(b) 14 East, 1.

(g) 1 Salk. 349.

(c) 11 A & E. 283.

(h) Lord CRANWORTH.

(d) 3 Jur. (N. S.) 1026.

right that it should be issued. As the case was opened to me, it appeared that there could be no doubt on the matter; but as it involved a question of importance relating to the rights and liberty of the subject, and also with reference to the process of the Courts of Common Law, I have asked the assistance of the two learned Judges who have heard the case with me. We have considered the case, and have come to a unanimous conclusion without doubt or hesitation.

First, as regards Merrifield. The only ground for his detention is, that he as the clerk of Dodd has served a writ which he had been directed by his employer to serve, and which by the express enactments of the Common Law Procedure Act may be served in any part \* of the world, whether in or out of the \* 524 United Kingdom. The clerk, therefore, did no more than he might lawfully do in serving the writ, and we are all clearly of opinion that there is no ground for detaining or imprisoning him.

Dodd is detained on the same ground, but he is also in custody on other grounds. If his detention had been only on that ground, then we should have discharged him as well as Merrifield. But by the return it appears that he is detained on three other writs besides that in question, from one of which, however, he has been discharged. We have therefore to consider whether either of those cases in which the return shows that he is detained is a valid ground for his being continued in custody, and we are of opinion that there is a perfectly good ground for his detention in the case in which proceedings have been taken against him calling on him to answer for a breach of trust. It is said that if that matter had been investigated in this country, it would be found that there had been no breach of trust. However that may be, there is nothing to show that the suit was not lawfully instituted in Jersey, and if it was decided erroneously, the only remedy is by an appeal to the Privy Council. The laws of Jersey must be taken to have been observed, and it is stated on the return that Dodd was lawfully arrested there. That must be taken to be sufficient.

With regard to the third ground on which Dodd is detained, it is stated to be the authority of a general warrant empowering a particular person to detain all his debtors, and it is argued that such a warrant is bad. If it had been necessary to decide that point, the Court would have taken time to consider, because it is

desirable that all the subjects of her Majesty should know  
 \* 525 that the \* arm of the superior Courts is powerful enough to reach any one of them by means of a writ of *habeas corpus*, but at the same time I should be slow to countenance a notion that on a return to a writ of *habeas corpus* persons acting not under the law of this country must be shown to have acted in the manner required from persons acting under that law. It may be that the proceedings stated on this return are regular according to the law of Jersey. How that may be I do not know, but the Court is relieved from considering that question, because, with reference to the case of the breach of trust, there can be no doubt that Dodd is properly detained.

The result is, that an order will be made for the discharge of Merrifield, but Dodd will be remitted to custody. With regard to the costs I should not have been sorry to have given costs as against Dodd, for he has obtained a writ of *habeas corpus* without declaring the whole grounds of his detention in prison: but the Court will be exceeding its duty if it should deal with the question of costs, as it has no jurisdiction with respect to them.

Merrifield was accordingly discharged and Dodd remanded.

April 20.

*Mr. W. R. Ellis* on this day obtained another order for a *habeas corpus* to bring up Mr. Dodd on an affidavit made by him to the following effect: —

That the deponent was illegally arrested and imprisoned in the debtors' gaol, Jersey, on the 1st of January, 1857, at the suit of William Foster Attwood and Caroline Henrietta Croome, his wife, and was still illegally detained in the said gaol at their suit. That there were two (and two only) descriptions of "mesne pro-  
 \* 526 cess" used in the said island, one being called an "*ordre de justice*" and the other "*ordre provisoire*"; that the deponent was arrested as aforesaid by John William Godfray, one of the denunciators of the Royal Court of Jersey, by virtue of an *ordre de justice* [being that already set out]. That the deponent was afterwards taken several times before the Royal Court of Jersey, and that on the 24th of January, 1857, an order was made by the Royal Court, in pursuance of which he was sent back to gaol, and that after he had been several times more brought before the Royal

Court, that Court on the 28th of February, 1857, made an order or act remitting the parties to the greffier, who was empowered to administer oaths, and before whom the deponent was ordered to produce just and good accounts of the moneys which he might have received in his capacity of trustee.

That these two several orders or acts were made by a Court composed of the "bailiff and two jurats" only, but that by the "charter" under which the Royal Court derived its power no Court was competent to transact any business or to make any effectual order, unless composed of the bailiff and twelve jurats, nor unless a majority in number of the twelve jurats should concur therein. That a Court composed of the bailiff and two jurats was then the ordinary Court, and that a full Court then consisted of a bailiff and seven jurats, being a majority of the said twelve jurats, and that such full Court was occasionally, though but very seldom, held in the island.

That by an ordinance of Henry 7th it was ordered, that each matter which should be passed before the jurats should be registered and subscribed by the hands of the jurats before whom it was passed. That the acts or orders of the 24th of January, 1857, and of the 28th of February, 1857, thereinbefore mentioned were not nor was either of them signed by either of the two jurats \* before whom it was passed, and that the deputy viscount \* 527 to whom the deponent applied for a copy of the Act of the 28th of February, 1857, informed him, and as deponent verily believed the fact to be, that such Act had not been registered.

That the deponent was detained in the debtors' gaol, Jersey, on Wednesday the 6th of January, 1858, by J. W. Godfray, such denunciator as aforesaid, at the instance of Charles Francis Taroni, by and under what was termed an order *provisoire*, and that such order being translated was as follows—[The affidavit set out the order, as *ante*, p. 521.] That such order was signed by E. L. Bisson, as a "Judge delegate," but that a Judge delegate had no authority to make or sign such order.

That by an order made by his Royal Highness the Prince Regent and the Privy Council on the 9th of May, 1811, it was ordered, that until further order should be made thereon, no person should be arrested by his body or by virtue thereof be obliged to give bail or security under or in consequence of any

process issuing out of any Court in the Island of Jersey for any debt sued for therein, before judgment should have been given in such suit, unless an affidavit should be first made, that the party sued for such debt had not offered to pay the same in notes of the governor and company of the Bank of England, expressed to be payable on demand (fractional parts of sums of 24 livres only excepted), such notes to be taken at the full sum therein specified, reckoning a pound at 24 livres.

That no affidavit of debt or of no tender or of any other kind was made previously to or on the occasion of the deponent's arrest and imprisonment at the suit of W. F. Attwood and C. H.

\* 528 Croome his wife, and that up \* to the present time no affidavit of any kind had been made, nor had any evidence whatever been tendered in the matter by or on behalf of W. F. Attwood and C. H. Croome his wife, or either of them, or otherwise in support of their claim, nor had any step towards the hearing of the cause upon its merits been taken since the 28th of February, 1857.

That no affidavit either of debt or of no tender or of any other kind was made previously to or on the occasion of the deponent's arrest and imprisonment at the suit of C. F. Taroni, and that at the present time no affidavit had been made, nor had any step been taken in the action so commenced by his arrest on meane process at the suit of C. F. Taroni, nor had any evidence whatever in support of his claim been produced against the deponent.

That J. W. Godfray was only a denunciator of the Royal Court of Jersey, and that such denunciator was in fact merely the crier or beadle of the Court, and had no authority whatever by virtue of his office of denunciator to make arrests. That the only persons duly authorized to make arrests in the said island were the viscount (or sheriff of the said island) and such persons as he might authorize to make such arrests by virtue of his patent from the Crown, such person usually being the deputy viscount. That J. W. Godfray was not authorized, and that he never had been authorized by the viscount (or sheriff) to make arrests, and that at the times of his so arresting the deponent as aforesaid, or any or either of them, he had no authority whatever to arrest him or any other person.

That at the time of the order *provisoire* being signed there

was not any bailiff of the island, Sir Thomas Le \* Breton, \* 529 the former bailiff of the island, being then dead, and that no successor to him having then been appointed.

May 5.

On this day Mr. Dodd was again brought up in obedience to the writ, with a return of the viscount and gaoler thereto.

The Lord Chancellor said that he had read the affidavit on which the *habeas* had been granted, and before calling upon the viscount and gaoler to produce the return, his Lordship wished to be satisfied that the affidavit was a sufficient foundation for issuing the writ.

*Mr. W. R. Ellis* and *Mr. Druce*, for Mr. Dodd, contended that, according to the statements contained in the affidavit, the arrests were illegal according to the law of Jersey.

*Mr. Sumner*, for the viscount and gaoler, and *Mr. Roundell Palmer* and *Mr. W. W. Mackeson*, for the state of Jersey, were not called upon.

THE LORD CHANCELLOR.—After full consideration of the affidavit and of the arguments which have been addressed to me, I think that the writ ought not to have been issued. The principal ground relied upon in support of it is the absence of an affidavit of debt and tender according to the order in council of the 9th of May, 1811. But assuming the order in council to be applicable to the present case, and that there was no affidavit of debt and tender on the 1st of January, 1857, still Mr. Dodd was afterwards on several occasions before the Royal Court and took other objections to his arrest, but the ground now relied upon never seems to have suggested itself. \* Taken at the utmost it \* 530 was a mere irregularity, which must be considered to have been waived by the several subsequent proceedings. It is clear that the proceedings might have been commenced without an arrest, and that the arrest was not an essential part of, but merely an incident in, the procedure. The Royal Court had possession of the action or suit, and under these circumstances had paramount jurisdiction over any proceedings in it; and supposing

there to have been any ground for saying that the arrest was illegal, it must be assumed that, on an application to that Court, it would have done its duty, and have directed the prisoner's discharge. His not having so applied may raise a strong suspicion that he knew there to be no law which entitled him to his discharge. As far as I can form a judgment, the order in council relied upon was not a sufficient ground for his discharge. But whether it was or not, the Royal Court was the proper tribunal to have been called into action. I am of opinion that the prisoner has waived all right to object on the ground of irregularity, and that the want of the affidavit was no ground for the application for a *habeas corpus*.

This was the principal ground relied upon for the prisoner's discharge, but I will just advert to the others. It is said that the arrest was illegal, and that there was no power in the denunciator to make the arrest. I must, however, give credit to the act of the Court, and must assume that the denunciator was duly required to make the arrest.

With regard to the sufficiency of the Court, the evidence is of the weakest description, being a mere assertion on the part of Mr.

Dodd on a point of foreign law. Now Lord DENMAN said \* 531 in *Carus Wilson's Case*: (a) \* "The security which the public has against the impunity of offenders is, that the Court which tries must be considered competent to convict." "A Court within the Queen's dominions exercising public authority must be taken to be competent to judge of its own law." I must in this case give credit to the Royal Court for not proceeding without being regularly constituted.

If I had looked at the affidavit more carefully when the application was made, I should have thought that there was no ground for issuing the writ. But under the circumstances, and in my anxiety to protect the liberty of the subject, and to give every opportunity for investigation, I was desirous to have the matter strictly inquired into. I now, however, think that there was not sufficient foundation to support the application for a *habeas corpus*, and that the writ ought not to have issued. The prisoner must be remanded.

*Mr. Sumner* asked for the costs of the viscount and gaoler and

(a) 7 Q. B. 1009.

their expenses of bringing up the prisoner, and referred to 31 Car. 2, c. 2 (the Habeas Corpus Act), *Rex v. Armiger*, (a) *The King v. Greenway*, (b) *Re Mayor of Hull*, (c) *Nicholas Fling's Case*. (d)

*Mr. W. R. Ellis* and *Mr. Druce*, for the prisoner,— This point has been already decided on the former *habeas corpus* in this matter, where the late Lord Chancellor, with Justices MARTIN and WILLES, held that this Court had no jurisdiction to give costs. The Habeas Corpus Act has no application to this writ, which is not issued under that Act.

\* *Mr. Sumner* referred to *Rex v. Steward of —*, (e) \* 582 *Anonymous*, (g) and *Crowley's Case*, (h) and said that the former decision was only in the case of Merrifield, who was discharged, and consequently not liable to pay costs.

The Lord Chancellor said, that at present it appeared to his Lordship that a gaoler may require payment of the expenses before bringing up a prisoner on *habeas corpus*, and that this must have been so held on the principle that the gaoler was not to lose by bringing up the prisoner. His Lordship therefore thought the viscount and gaoler entitled to their expenses, but reserved his judgment as to the costs.

May 8.

THE LORD CHANCELLOR.— I have looked very carefully into the authorities in this case, in which it appeared to me that I ought, if I could do so, to award the costs against Mr. Dodd.

I think that there is a distinction between what may be called the expenses and the costs ; and that there may be one rule applicable to the expenses, and another rule applicable to the costs. I certainly have great difficulty in saying that I have any jurisdiction to award the costs generally, which would include the costs of the hearing against Mr. Dodd the prisoner ; but with regard to the expenses, I have a strong impression after considering the cases and the Act of Parliament, which (although this is not an

- (a) 1 Keble, 272.
- (b) 2 Show. 172.
- (c) 1 Keble, 566.
- (d) Barnes, 377.

- (e) Jones, 178.
- (g) 1 Strange, 308.
- (h) 2 Swanst. 1.

application under it) may not be wholly immaterial. The result of my opinion upon the whole matter is, that so far as the expenses are concerned, that is the expenses of bringing Mr. Dodd from Jersey, I ought to make an order for the payment of them by him.

\* 533 \* It appears that prior to the passing of the Habeas Corpus Act (in which provision is made for the payment of the expenses for the conveyance of the prisoner), there are authorities to show that the gaoler or sheriff had a right to demand from the prisoner what are called in one case the charges, (a) and in another the fees. (b) I think that this must be understood to embrace the expenses of bringing him before the Court. And when I find that under the second section of the Habeas Corpus Act, which applies to criminal cases, there is a provision made even for the criminal prisoner paying or tendering the charges of bringing him before the Court, it strengthens the opinion which I have formed upon the authorities, that in a *habeas corpus* at common law and in a civil suit, as this is, the sheriff or viscount is entitled to his expenses.

Under these circumstances I consider, that though I have no jurisdiction to award the costs generally, I have power to award the expenses as distinguished from the general costs, and that, under the circumstances of this case, it is my duty to do so.

1858. February 1. Before the Lord Chancellor Lord CRANWORTH. February 25. Before the Lord Chancellor Lord CRANWORTH and the LORDS JUSTICES.

The Settled Estates Act, in requiring the appointment of a solicitor to examine a married woman abroad, means a solicitor of the Court of Chancery in England, and therefore the Court refused to direct a commission to a barrister and solicitor of a Court in Canada for that purpose.

THIS was an application under the 19 & 20 Vict. c. 120, § 38, which provides that "the examination of such married woman

(a) 1 Keb. 272.

(b) 1 Keb. 566.

shall be made either by the Court or by some solicitor duly appointed by the Court for that purpose, who shall certify under his hand, that he has examined her apart from her husband, and is satisfied that she is aware of the nature and effect of the intended application, and that she freely desires to make or consent to the same."

Under this provision it was proposed to direct a commission to Andrew Stuart, Esquire, a barrister and attorney at Quebec, to take the examination of a married woman residing at that place, at which it appeared there resided no solicitor of any English Court. The application was originally made to Vice-Chancellor KINDERSLEY, who thought that the Act did not authorize the order sought.

February 25.

*Mr. C. Swanston* on this day renewed the application to the Lord Chancellor, who at first was inclined to think that the order might be made, but on the case being again mentioned on this day before the full Court, —

Their Lordships held, that the terms of the section required the appointment of an officer of the Court of Chancery in England.

No order made.

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\* In the Matter of ILMINSTER FREE SCHOOL.<sup>1</sup> \* 535

And in the Matter of The CHARITABLE TRUSTS ACT, 1853 ;  
and in the Matter of The CHARITABLE TRUSTS AMENDMENT ACT, 1855 ; and in the Matter of The TRUSTEE ACT, 1850.

1858. May 22, 25. Before the LORDS JUSTICES.

Lands were purchased in the reign of Edward the 6th by inhabitants of a town, and were, under a charter of that reign, conveyed to trustees upon trust to maintain a school, and also for the repairs of public ways and bridges. The

<sup>1</sup> S. C. in D. P. 8 H. L. Cas. 495, *nom. Baker v. Lee.*

trustees had the power of appointing and removing the schoolmaster. The schoolmaster had always been appointed from members of the Church of England, but latterly dissenters had been admitted into the school, and had not been required to be instructed in the tenets of that church, and on some occasions dissenters had been appointed trustees, but not by the Court: *Held*, —

1. That the constitution of the school could not be changed on an application for the appointment of new trustees.
2. That, without a change in the constitution of the school, dissenters were not proper persons to be trustees of the charity.<sup>1</sup>

THIS was an appeal from the decision of the Master of the Rolls (on an application in chambers which had been adjourned into Court) holding that persons dissenting from the doctrines of the Church of England were eligible to be appointed and to act as trustees of the above charity, and appointing trustees accordingly.

The charity was founded in the reign of King Edward the 6th, and the trusts of it were declared by a deed of the 18th of May, 1549, made between Humphry Walrand and Henry Greynfylde, both of Ilminster, of the one part, and John Balche and several other trustees of the other part. By this deed Humphry Walrand and Henry Greynfylde, "tendering the virtuous education of youth in literature and godly learning, whereby the same youth so brought up shall the better know their duty as well to God as the King's Majesty, and for divers other honest and godly considerations," demised unto John Balche and the other trustees all the estate, right, title, use, interest, and term of years which

\* 536 Humphry \* Walrand and Henry Greynfylde had in certain lands and hereditaments therein described, upon trusts thus expressed: "First, that the said John Balche, John Sydenham, and the others before named, their executors and assigns and every of them, and the executors and assigns of every of them, after the feast of St. Michael the Archangel next ensuing the date hereof, from time to time during the said term shall, by their discretion or by the discretion of the more part of them, provide and get one honest and discreet person, of good behaviour, name, fame, conversation, and condition, to be a schoolmaster, which shall freely instruct, teach, induce, and bring up, as well in all godly

<sup>1</sup> See Lewin Trusts (5th Eng. ed.) 400, 401; *Re Stafford Charities*, 25 Beav. 28; *Attorney-General v. Clifton*, 32 Beav. 596; *Attorney-General v. Murdoch*, 1 De G., M. & G. 86, note (3), 121, note (1), and cases cited; *Perry Trusts*, § 733.

learning and knowledge as in other manner of learning, all such children and youth as shall be brought to him, to the same intent and purpose, according to the tender wit and capacities of such youth and young children, as the same schoolmaster from time to time shall think meet and convenient; and that they the said John Balche and others before named, their executors and assigns, and the executors and assigns of every of them, or the most part of them, shall appoint the same schoolmaster one tenement called the Crosse House, in the which house the said schoolmaster shall inhabit and dwell during all such time as he shall continue schoolmaster there; and if it fortune the said schoolmaster to be negligent or remiss in teaching of the said youth, or be detected of any notable crime or default, and that lawfully approved before the said John Balche and others before named, or before the most part of them being together, that then it shall be lawful for the said John Balche and others before named, or to the most part of them, to discharge and put away the said schoolmaster, giving unto him one whole quarter's warning at the least, and in his place to select and choose one other meet schoolmaster, of honest conversation and behaviour, to do as the other schoolmaster should do; \*and that the said John Balche and others \* 537 before named, or the more part of them, their executors or assigns, being present at Ilminster the first Sunday in October, between the hours of one and three of the clock in the afternoon of the same Sunday, in one of the houses parcel of the premises next adjoining to the church-yard of Ilminster aforesaid, or in some other honest place by them or by the more part of them agreed, shall yearly elect and choose one honest person to be the bailiff of the premises, and of every parcel thereof, to gather, receive, and levy all the issues and profits of the premises, and with the same issues and profits so received by the said bailiff as aforesaid shall repair, sustain, maintain, and do all manner of reparations in and upon two of the houses called the Crosse House and Battyns House, and also pay or cause to be paid unto the schoolmaster for the time being such salary and stipend as by the said John Balche and others before named, or the more part of them, shall be appointed, and pay the rent of all the premises to the lord, reserved upon the former leases made by the Abbot and Convent of Muckelmy; and of the residue of the issues and profits of the premises shall yearly during the said term, the said

first Sunday in October, in Ilminster aforesaid, in the place aforesaid and betwixt the hours aforesaid, make to the said John Balche and others before named, or to the most part of them as shall be there then present, a true account and reckoning of the same, and that all such sum or sums of money as shall be found due upon the said account shall be forthwith delivered by the said bailiff to the said John Balche and others before named, or to the most part of them being present at the making of the said account, and the same money so delivered to the said John Balche and others before named, or to the most part of them being present at the said account, shall be put into one convenient coffer with four

\* 538 locks \* and four keys, to be set in such convenient and sure place as shall be thought most convenient by the discretion of the said John Balche and others before named, to be bestowed for the discharge of King's silvers and for the mending and repairing the highways, bridges, watercourses, and conduits of water wherewith the inhabitants of the said parish of Ilminster are or shall be charged or chargeable, as far as the said sums of money will extend unto, and that the said bailiff so accounting as aforesaid shall have allowed unto him upon his said account 3s. 4d. for his pains for executing of the premises for that year past; and furthermore, to the intent that the deeds of charity aforesaid may have their continuance to the end and term of all the years yet to come, it is therefore agreed betwixt the said parties that if it happen the said grantees to die, so that there remain but four of them in life, that then the said four persons then being in life shall give, grant, and set out their right, tithe, and term of years then enduring to as many other honest persons of the said parish of Ilminster, to the number of twenty, as shall be by the said grantees then onliving thought most convenient, to the uses, intents, and purposes afore rehearsed; and to the intent that no variance or debate should or might grow, rise, or be amongst the said grantees by any sinister labour, as well for the nomination and election of the said schoolmaster and bailiff as for the employment of the issues and profits of the premises about the necessary things before rehearsed, and also for the letting or setting of the premises, or any part thereof, to any tenant or tenants for any part or parcel of the years yet enduring, therefore it is condescended and agreed between the said parties that none of the said grantees shall at any time during the years promise or grant their good will or good

wills to any person or persons to be schoolmaster, bailiff, or tenant of any part or parcel of the premises, but only the said first Sunday in \*October, betwixt the hours aforesaid, \*539 openly in the said house or place whereat the said account is by these presents before appointed to be made, and that no leases or grant of the premises, or of any part thereof, shall be made but in the place before appointed, and that every lease or grant then and there made of the premises, or of any part or parcel thereof, to any person or persons by the assent of the said grantees, or the most part of them then being present, and entered into the book of account, shall be good and effectual against the said John Balche and others before named, their executors and assigns, during the years, to any such person or persons granted during the said term; provided always that the said Humphry Walrand and Henry Greynfylde and every of them shall have as full authority, power, nomination, and voice in and about the election and nomination, as well of the said schoolmaster, bailiff, and employment of the issues and profits of the premises, and about the necessary things before expressed, or about any other necessary thing or things hereafter to be done, as also about the setting, letting, or assigning of the premises, or any parcel thereof, to any person or persons as any of them the said John Balche and others before named shall or may have by reason of these indentures, or any thing therein contained, any thing, article, or grant herein contained to the contrary notwithstanding."

The first account relating to the charity was made out in the year 1549, and was headed "The Account of the Lands purchased for the School in Ilminster," and at the end of it was a schedule of sums headed "Debts owing by the parish for the purchasing of this Land upon this Account." One of the debts included in that schedule was to Humphry Walrand, one of the apparent founders of the charity, "for the devising of the assurance."

\* The only property comprised in the original endowment now remaining vested in the trustees was the site of a house called the Chauntry House, on which the school-house partly stood; but the trustees in former years, by means of their savings from time to time, purchased various lands in the counties of Somerset and Dorset, from which the income of the charity was now derived, part of which was held in fee-simple, and the remainder for long terms of years absolute.

By an indenture, dated the 17th of August, 1827, and made between William Hanning of the one part, and Thomas Slatter, Richard Bush, Richard Thomas Coombe, Samuel Alford Clerk, John Baker, John Slatter, William Slatter, and John Colling, who were then, with the said William Hanning, the surviving trustees of the said charity, of the other part, the said William Hanning for the purposes therein expressed conveyed certain freehold hereditaments in Ilminster, and assigned four shares in University College, London, to the masters of the said charity, for the purpose of providing exhibitions at Oxford and the said University College for boys educated at Ilminster school. And it was provided that the trustees to be thereafter appointed of the charity should, on their appointment, become trustees of the indenture. The last appointment of new trustees of the charity was made on the 30th of November, 1836.

The school was for a great many years (if not from the commencement) used as a grammar school, and for a considerable period at least a clergyman in holy orders had been the master. Auxiliary schools for the teaching of reading, writing, and arithmetic had been from time to time established by the trustees out of the surplus income of the charity (the origin of the first dating

back about 200 years), and by means of these a larger

\* 541 number \* of children received a free education. Both in the grammar school and in the auxiliary schools now and for many years past, from a remote period, the foundation had been open to children of all religious denominations, who had been admitted into the schools, it not having been insisted upon that all the children should learn the church catechism; and the children of dissenters were not now nor had ever been required to learn the same in the schools, or to attend the parish church.

Sums had also been from time to time expended in the repairs of the bridges, highways, and conduits in Ilminster; and there was still a constant outlay by the trustees for such purposes.

It appeared that in the year 1725 one at least of the trustees, viz., Robert Collins, was a dissenter, and that in the same year a son of this Robert Collins and five other persons, also dissenters, were appointed trustees. It also appeared that in the years 1741, 1763, 1784, and 1802 dissenters were appointed trustees of and acted in the management of the charity.

The present trustees insisted before the Master of the Rolls in

chambers that the charity was not strictly a Church of England charity, for the following reasons, viz.:—

1. That the charity was not founded by the gift of an individual, but by the parish, and probably by subscriptions amongst the parishioners.
2. That the charity was not entirely educational, the surplus income being expended in the repairs of the highways, bridges, watercourses, and conduits of water.
- \* 3. That the only religious expression used in the trust \* 542 was "godly learning," a term which would be used by Christians of all denominations.
4. That the school had from time to time immemorial been open to children of dissenters, who had been educated therein without any question at all being raised as to their eligibility, and that children of dissenters had not been required to learn the church catechism or attend the parish church.

The Master of the Rolls held that the charity could not be regarded as founded exclusively for Church of England purposes; for that, although the school appeared undoubtedly to have been founded for those purposes, the surplus income was devoted to the repair of the roads, the bridges, and the highways, which was not peculiarly a Church of England purpose, but a trust of which all persons were as competent to perform the duties as members of the Church of England. His Honor was of opinion therefore that the course which had been hitherto adopted in respect of the appointment of trustees was a fit and proper one, and saw no reason why the Court should interfere to restrict the trustees to be appointed to members of the Church of England.

*Mr. Baggallay* (with whom was *Mr. Roundell Palmer*), in support of the appeal.—The school is the principal object of the charity, and "godly learning" is to be taught in it; consequently religious instruction must be provided for, and as different systems of religion cannot be conveniently taught, one must be adopted, although it is not compulsorily to be taught to those who conscientiously object to it. The doctrine to be taught must be that of the Church of England, as being the religion professed at the time of the \*endowment, and that which the Court \* 543

would direct to be taught, if it were now settling a scheme for such a charity. That, however, has not now to be done, for the tenets taught have always been those of the Church of England. A change in this respect cannot be made without a new scheme being approved of by the Court, and no application for that purpose has been made by any one. Indeed, the judgment under appeal assumes that the religion to be taught in the school is to be that of the Church of England. But if this be so, it is submitted that the persons who are to appoint the schoolmaster ought to be members of that church. The only ground on which the Master of the Rolls appears to have considered this improper is, that there are other objects of the charity besides the school. These, however, are secondary objects, and may be as well intrusted to churchmen as to dissenters.

He referred to *Attorney-General v. Cullum*, (a) *Chelmsford School Case*. (b)

*Mr. Baker*, for some of the inhabitants who had leave to be heard by separate counsel.—The argument which has generally been urged for the exclusion of dissenters from charities founded about this period, namely, that there was then no dissent, does not apply to the present case. For this charity was founded in March, 1549, by the purchase of the lands, which was completed in May, 1549, while the Act of the 1st Edward 6, c. 12, was in force. It was not till June, 1549, that the Act of 2 & 3 Edward 6, c. 1, for uniformity of service came into operation. The articles of the church were not promulgated till 1551, and were not \*544 then those of the present church. Indeed the Act of the \*5 & 6 Edward 6, c. 1, was the first which prohibited dissent. It does not appear that dissenters have ever been excluded from being trustees. On the contrary, there are instances in which they have been appointed and have acted, as far back as 1702.

He referred to *Attorney-General v. Calvert*, (c) *Cox's Case*, (d) *Attorney-General v. The Haberdashers' Company*, (e) and distin-

- (a) 1 Y. & C. C. C. 411.
- (b) 1 K. & J. 543.
- (c) 28 Beav. 248.

- (d) 1 P. Wms. 29.
- (e) 19 Beav. 385.

*guished Attorney-General v. The Governors of the Sherborne Grammar School. (a)*

*Mr. Toller and Mr. Nalder supported the same view of the case, and referred to Re Norwich Charities, (b) Re Stafford Charities. (c)*

*Mr. Palmer, in reply.*

**THE LORD JUSTICE KNIGHT BRUCE.** — The foundation deed, in this case, dated the 18th of May, 1549 (which was in the reign of King Edward the 6th), has for its primary object education, education including, though not confined to, religious instruction, which religious instruction must (as I consider), according to the language and intention of the instrument, be in conformity with the doctrines of the Church of England. The objects of the foundation not connected with education are secondary and subordinate; so at least I read the document. The master is directed to be appointed and made removable in certain events, by the trustees for the time being, or some of them, whose duty it is also to fix his salary and provide for the \* repair of the school- \* 545 house. It is not suggested that any master of the school is, or for two centuries and more has been, a dissenter from the established church. In these circumstances it appears to me, that every trustee ought to be a member of the Church of England, although the sons of dissenters are very properly admitted to participate in the advantages of the school without having the doctrines of the Anglican Church inculcated on their minds, or being instructed in those doctrines or obliged to attend her services.

**THE LORD JUSTICE TURNER.** — The argument addressed to us on the part of some of the inhabitants of this parish is such as might have been properly urged if we were engaged in settling a scheme. It is, however, an argument wholly beside the present question. We find that the school has been conducted for a long period as other schools of the Church of England are conducted. Now, admitting (as the trustees have wisely and properly done) dissenters to the full benefit of the institution, without imposing upon

them those tenets of the Church of England with which their opinions do not agree, I think that in considering the question of the appointment of new trustees, we are bound to take the charity as we find it existing when the appointment is called for, and if any alteration is to be made in the institution, it must be made by means of a scheme remodelling the administration of the charity.

That being the view which I take, the point we have to consider is, whether, to a school constituted as this now is, dissenters ought to be appointed to be trustees of it. In my opinion they ought not. Not that I wish to exclude dissenters from any appointment

\* 546 to which they are properly eligible, but I think that the effect of introducing them into a trust of this description will tend to provoke religious disputes, and be most prejudicial to the due conduct of the charity. Observe what are their powers and duties. They are to appoint and remove the master. Suppose by the deaths of the other trustees the dissenters become a majority; what will be the consequence? There are now five trustees left, and the three now to be appointed may be the survivors, the effect of which would be that the appointment of a master of a school of the Church of England would be made by dissenters. But not only is his appointment and removal in the power of the trustees, but they are to fix his salary. I think that such a power should not be vested in trustees not agreeing in religious opinions with the master whom they are to appoint.

It has been argued, however, that the trust is not confined to the school, but is a mixed trust, there being a residuary trust for the benefit of the inhabitants of the parish generally. But in this, as in all cases, we must see what is the principal trust, and here it is clearly the school. For education and learning are declared to be the principal purposes of the charity, and are the purposes for which the fund is to be primarily applied under the trusts, so that the Court in settling a scheme would attend to the increase of scholars before applying any part of the fund to the general purposes of the parish. The primary object is the school, and the duty of the Court, would be to add to the number of scholars, notwithstanding the trust of the residue.

Another argument urged is, that dissenters have from time to time been appointed trustees. But that has not been done by the Court. The trustees from time to time may have taken upon

themselves to appoint dissenters, but that has never been brought before the Court, and the \* Court has never recognized such an appointment, nor can it be bound by such a practice on the part of the trustees. \* 547

It is said, that such an order as we are about to make may prejudice the dissenters. I wish it may not be so. I do not believe that it will, and the Court would no doubt interfere to prevent any such result.

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## WILLIAMS v. THE ST. GEORGE'S HARBOUR COMPANY.

1858. May 27, 29. Before the LORDS JUSTICES.

An appeal after the lapse of a month from the refusal of a motion for an injunction to restrain a public company from proceeding with their works, ordered to stand over till the hearing, as being brought too late.<sup>1</sup>

A land-owner withdrew his opposition in Parliament to a harbour and railway bill on an agreement with the promoters that the company would take his land on certain terms. After the passing of the Act the land-owners brought an action for breach of the agreement against the promoters, which was stayed on the company being made (by arrangement) defendants to a new action and suffering judgment for the demand: *Held*, that the company thereby adopted the agreement, whether it would have been otherwise binding on them or not (as to which, *quære?*) and that it was not vitiated by one of its terms being that the company should pay the costs of the land-owner's opposition to the bill.<sup>2</sup>

THIS was originally an appeal from the refusal by the Master of the Rolls of an injunction to restrain the defendants, who were a harbour and railway company incorporated by Act of Parliament from completing a part of their works until they had performed an agreement with the plaintiff entered into by the promoters in Parliament of the bill by which the defendants were incorporated.

The appeal motion was on the ground of delay ordered to stand over till the hearing, the decision of the Master of the Rolls having been given on the 24th of \* June, and the \* 548 appeal not brought till the 25th of July. By arrangement

<sup>1</sup> See Kerr Inj. 632.

<sup>2</sup> See Kerr Inj. 563, 564; 1 Dart V. & P. (4th Eng. ed.) 50; Sugden V. & P. (14th Eng. ed.) 75, 76.

the hearing was ordered to take place originally before their Lordships on a motion for decree.

On the bill (as amended), and the evidence, the following appeared to be the material facts.

In 1853, application was made to Parliament for an Act to authorize the construction of an harbour at Llandudno Bay, in Carnarvonshire, between Great and Little Ormshead, and also the construction of a branch line of railway along the east bank of the river Conway from that harbour to the main line of the Chester and Holyhead Railway Company.

The plaintiff, who was the owner in fee of lands abutting or adjoining on the eastern side of the proposed branch line of railway, opposed the application to Parliament, but ultimately withdrew his opposition upon the terms set forth in the following memorandum:—

“ Memorandum the 23d July, 1853.

“ On Colonel Williams withdrawing his opposition to the St. George’s Harbour Railway bill, it is agreed by Mr. Motte on behalf of himself and the other promoters, first, that Colonel Williams’s cost of opposition, as between solicitor and client, shall at once be paid by the promoters. That within one month from the passing of the Act a sum of 250*l.*, and before any ground of Colonel Williams is taken, and before the formation of the said railway is commenced, a further sum of 1750*l.* shall be paid to him as for ascertained consequential damages to his Marle estate. That the payment of such land as is taken or severance of the

estate effected shall in addition be assessed as under the \* 549 Railway Acts, and paid for. \*That the line shall be car-

ried as far as engineering convenience will in any way permit in the direction of the line marked red in the accompanying plan, the company making a good carriage roadway inside. That such crossings over the same railway shall be made by the company for the use of him and his tenants, as he or they shall require.

“ STANDISH MOTTE,  
“ G. T. ELLISON.”

Mr. Motte was then one of the principal promoters of the projected harbour and railway works.

By the Act of Parliament which was passed in 1853, Mr. Motte and all other persons and corporations who had already subscribed or should thereafter subscribe to the undertaking, and their executors, administrators, and assigns respectively, were united into a company for the purpose of making and maintaining the harbour and railway thereby authorized by the name of the St. George's Harbour Company, and were entitled to take among other lands those mentioned in the agreement for the purposes of their undertaking.

After the passing of the Act, the plaintiff applied to the defendants for payment of the 250*l.* and his costs of opposition, according to the agreement, those costs having by a subsequent agreement between the plaintiff and the defendants been fixed at 122*l.* 11*s.* 8*d.* On the 21st of June, 1854, he commenced an action against them to recover these amounts.

This action was afterwards abandoned, and a fresh one commenced against Mr. Motte. Upon the second action being brought, the company agreed to satisfy the claim. A third action was consequently by arrangement brought, \* in \* 550 which the company were again defendants, and in this action judgment was by consent entered up against the company. The writ of summons in the last-mentioned action was thus indorsed.

"The plaintiff claims 372*l.* 11*s.* 8*d.* for debt, and 2*l.* for costs, and if the amount thereof be paid to the plaintiff or to his attorney within four days from the service hereof, further proceedings will be stayed. The following are the particulars of the plaintiff's claim, the costs of an agreement dated the 23d of July, 1853, 122*l.* 11*s.* 8*d.* To instalment for consequential damages under the said agreement, 250*l.* Total 372*l.* 11*s.* 8*d.*"

There was also the following notice :—

"Take notice that if the defendants served with this writ within the jurisdiction of the Court do not appear according to the exigencies thereof, the plaintiff will be at liberty to sign final judgment for the same."

The final judgment was duly signed against the defendants on  
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the 1st of July, 1854, under the following Judge's order, dated the 29th of June, 1854, and made in the action : —

"Upon hearing the attorneys or agents on both sides, I do order that the plaintiff be at liberty to sign final judgment forthwith ; and, by consent, that all further proceedings in this cause be stayed, and that the debt as agreed on, amounting to  $372l. 11s. 8d.$ , and costs as agreed on, at  $14l. 12s. 5d.$ , be paid in the manner following, namely, on the 31st December next ; and I further order, that in case default be made in payment of the amount to be paid as aforesaid, the plaintiff shall be at liberty to sign final judgment for debt and costs, and issue execution for the amount with costs on such judgment and execution."

\* 551 \* No part of the sums of  $372l. 11s. 8d.$ , and costs of action, having been paid to the plaintiff, but the defendants having nevertheless commenced their works affecting the plaintiff's land comprised in the agreement, he filed the present bill, praying that it might be declared, that the agreement of the 23d of July, 1853, was binding on the defendants, and that the defendants might be decreed to pay to the plaintiff the sum of  $1750l.$  in and by the agreement of the 23d of July, 1853, agreed to be paid to him for ascertained consequential damages, as in the same agreement was mentioned, with interest thereon from the day on which the said proposed railway was commenced, and otherwise specifically to perform the agreement on their parts, except so far as related to the costs of opposition and other moneys therein agreed to be paid, which had been already secured to the plaintiff as thereinbefore was mentioned ; and that until full payment to the plaintiff of the said sum of  $1750l.$  and interest thereon, the defendants, their architects, contractors, builders, agents, servants, and workmen might be restrained by injunction from carrying on or proceeding with the formation or construction of the said proposed branch line of railway from the St. George's Harbour aforesaid to the main line of the Chester and Holyhead Railway, or the formation or construction of the works connected therewith or belonging thereto, and from digging up or removing any soil or ground upon or from the said proposed line of railway, or carrying any stones or other materials to or upon the same, or erecting any sheds or buildings thereon, or doing or taking any other act or step in or preparatory

to the formation or construction of such proposed line and works, and also from carrying any passengers, goods, or other traffic on the said line when constructed, and from otherwise using the same or the works thereof.

\* The Master of the Rolls refused the injunction on the \* 552 ground that the agreement was not binding on the company, referring to the recent decision of the House of Lords in *Preston v. The Liverpool Railway Company*. (a) The case is reported on the motion at the Rolls in Mr. Beavan's Reports. (b)

*Mr. Roundell Palmer* and *Mr. Osborne Morgan*, for the plaintiff.—The principle on which *Edwards v. The Grand Junction Canal Company* (c) was decided, remains untouched by the recent case of *Preston v. The Liverpool Railway Company*; (a) that principle is still binding, and is, that a company shall not exercise over the property of a land-owner a power which they acquired by means of bargain entered into by the promoters without ratifying that bargain and fulfilling its stipulations. In the case in the House of Lords the company did not require to take the land of the land-owner with whom the contract was made. Here the company require the land, and they have agreed as to the price to be paid for it. If they had not so agreed, a jury would have had to fix the price. At all events the company have here, after their incorporation, ratified the contract by consenting to the judgment on the footing of it.

They referred to: *The Vauxhall Bridge Company v. Earl of Spencer*, (d) *Wilkes v. The Hungerford Market Company*, (e) *Regina v. The Eastern Counties Railway Company*, (g) *Edwards v. The Grand Junction Railway Company*, (c) *Stanley v. The Chester and Birkenhead Railway Company*, (h) \* 553 *Gooday v. The Colchester Railway Company*, (i) *Lord Lindsey v. The Great Northern Railway Company*, (k) *Preston v. The Liverpool and Manchester, &c., Railway Company*, (l) *Hawkes v.*

- (a) 5 H. L. Cas. 605.  
(b) Vol. 24, p. 339.  
(c) 1 Myl. & Cr. 650.  
(d) Jac. 64.  
(e) 2 Bing. N. C. 281.

- (g) 2 Q. B. 347.  
(h) 3 Myl. & Cr. 773.  
(i) 17 Beav. 132.  
(k) 10 Hare, 664.  
(l) 1 Sim. N. S. 586; 5 H. L. Cas. 605.

*The Eastern Counties Railway Company, (a) Stuart v. The London and North-Western Railway Company, (b) The Leominster Canal Navigation Company v. The Shrewsbury and Hereford Railway Company, (c) The Caledonian Railway Company v. The Saint Helensburgh Harbour Trustees. (d)*

*Mr. Selwyn and Mr. Hetherington*, for the defendants. — The late decision of the House of Lords has overruled the cases in which it was considered that a company was bound not only by its Act of Parliament, but by every agreement which from time to time the promoters may have made with a land-owner as to the terms of his withdrawing his opposition. A more mischievous doctrine could not have been laid down; for the result of it might be that a company might come into existence fettered with obligations which were unknown to the legislature when it conferred powers upon the company, and the knowledge of which might have prevented those powers from being given. Moreover, as Lord CRANWORTH observed in the case in the House of Lords, no purchaser of shares could tell by reading the Act what obligations the company was liable to. The only safe rule is, that a land-owner stipulating for special privileges must take care to have them reserved to him by the Act in order that they may be known. Suppose there were a consolidation of several companies, would the aggregate \* 554 \* company be bound by the contracts of the promoters of all of them, inconsistent with one another as they may have been?

[THE LORD JUSTICE TURNER. — Did the House of Lords call in question the principle, that if the lands are taken they must be taken on the terms of the contract?]

There is no distinction made in the case as to the lands being required or not, but the principle of the case is that promoters cannot bind the company, unless by a clause in the Act.

[THE LORD JUSTICE TURNER. — Did the House of Lords decide more than that the promoters were not to be regarded as the agents of the company?]

- (a) 5 H. L. Cas. 331.
- (b) 1 De G., M. & G. 721.

- (c) 3 K. & J. 654.
- (d) 2 Macq. 391.

We submit that it decided the general proposition which we have mentioned. We need not deny that the withdrawal of opposition to the bill is sufficient consideration for an agreement by the promoters (though that admits of doubt), but we do deny that the passing of the Act is an adoption by the company of every bargain made by the promoters, or that the parliamentary powers have been so acquired by means of the bargain as to render it binding necessarily on the company. The only consideration mentioned in the preamble of the Act, as to the inducement for passing it is, that it will be of great public advantage. Was it then part of the inducement to the legislature to pass the Act, that Mr. Williams, who at first said it was not to the public advantage to pass the Act should afterwards admit that it was to the public advantage? Or does not the legislature afford all the safeguards which it thinks fit to protect proprietors by inserting such clauses in the Act as are sufficient for this purpose? As to the company having ratified the agreement, all that they have done is to consent to judgment being entered up against them. That has been done, and if the plaintiff wishes to act upon it, the Court of Law affords him all the means of doing so, to which he is entitled, and there is no equity in the matter.

\* They referred to *Greenhalgh v. The Manchester and Birmingham Railway Company.* (a) \* 555

*Mr. Osborne Morgan*, in reply.

THE LORD JUSTICE KNIGHT BRUCE.—The defendants in this case accede to the position that, independently of the agreement in question (that of the 23d of July, 1858), the plaintiff is or would be entitled to contend before a jury, that he has sustained permanent damage in respect of his lands near the line of the defendants' railway by means of its construction; and, proving so much, to ask from the defendants at the hands of a jury pecuniary compensation of a commensurate amount. The agreement, so far as material now to be considered, was in effect to admit the damage and assess the amount of compensation; nor can it, I think, be reasonably denied that the construction of the railway was likely

to cause and has caused damage to the plaintiff of a permanent and substantial kind in respect of those lands, though perhaps some benefit also. Very possibly, therefore, if the proceedings at law that have taken place had not taken place, I should have considered the plaintiff entitled to the relief asked by the bill, or a substantial part of it; but if there would without those proceedings have been any difficulty in his way to the relief that he asks, they have, as I conceived, removed it.

The present bill in its original state was filed in the month of June, 1857; but in the month of June, 1854, the plaintiff had commenced against the defendants, in the Court of Queen's Bench,

\* 556 an action upon the agreement for two sums, which, upon the assumption that it \* bound the defendants, had then by force and on the footing of it become due from them to him.

The writ of summons in the action was thus indorsed : [His Lordship read the indorsement set out above.] Then there is this notice : [His Lordship read it.] In the action, final judgment was duly signed against the defendants on the 1st of July, 1854, under a Judge's order dated the 29th of June, 1854, and made in the action, which order was in these terms : [His Lordship read it.]

That judgment binds the defendants equitably as well as legally, and did so from the time when it was signed, more than two years before the commencement of the present suit, which is in effect to recover under that agreement a sum that, if it binds the defendants, is now payable by the defendants to him under it, though this sum had not become payable before or in July, 1854.

The judgment obtained as it was by consent appears to me to amount to a recognition by the defendants of the agreement as an agreement binding on them. The agreement would as to the money at least have been, I think, certainly valid against the defendants, if made by them with proper formality after the passing of the Act of Parliament in question, which received the royal assent in August, 1853; and it must now, in my opinion, be treated by this Court as binding on them, nor is the plaintiff, who undertakes to allow such time (if any) for payment of the judgment as the Court here shall deem reasonable, to be driven hence to seek relief by an action in which, if defended, he may possibly fail; but he does not ask, nor will he obtain from us, any relief, except a decree for payment of the 1750*l.* without interest, though with the costs of the suit.

\* THE LORD JUSTICE TURNER.—If it had been necessary \* 557 for us in this case to give an opinion on many of the important questions which have been raised in the argument before us, I should most certainly have desired further time to consider those questions ; but it seems to me that this case may well be decided, and ought to be decided without reference to any other than the simple question, whether the company have or have not adopted this agreement.

By the terms of the company's Act of Parliament, the directors of the company were placed in this position ; they had an option either to agree with the plaintiff as to the amount which he should be paid for consequential damage or to have the question of the amount which was to be so paid submitted to a jury. An agreement had been entered into by Mr. Motte, who was one of the promoters of the company for ascertaining the amount which was to be paid for the consequential damage ; and, having the power to agree as to the amount, the directors of the company had of course the power to adopt the agreement, which had been entered into by Mr. Motte as to the amount to be paid.

Then the question is, in my view of it, Had they adopted or did they not adopt that agreement ? I feel no doubt whatever that they had adopted and did adopt that agreement.

For how does the case stand ? First, an action was brought against the company for the amount of compensation agreed to be paid under the agreement of the 3d of July, 1853. That action was abandoned, and another action was commenced against Mr. Motte, the contracting party who had signed the agreement for the recovery of the costs which had been provided for by the agreement, \* and of that instalment of the compensation-money which had become due. Upon that action being brought against Mr. Motte, the company agreed to pay the costs which were sought to be recovered from Mr. Motte, and they agreed also to pay the instalment of the compensation-money which had become due. In order to effectuate this agreement, a third action was brought by the plaintiff against the company for the recovery of the costs agreed to be paid, and of the instalment of the compensation-money which was due, and in that action the company confessed judgment for the costs so agreed to be paid under the agreement of the 23d of July, 1853, and for the amount

of the compensation-money as a sum to be paid under the agreement. I think this a perfectly plain acknowledgment by the company, that that sum was due under the agreement, and an agreement on the part of the company to pay the amount. I feel, therefore, no doubt that this company have adopted the agreement.

It is said, that the agreement was in part illegal, because there was a provision in it for payment of the costs of opposing the bill in Parliament. I think, however, that the agreement must be regarded as a whole, and not with reference to its several parts, and that, therefore, the payment of the costs must be considered part of the price which was agreed to be received by the plaintiff as compensation for the damage which was admitted to have been sustained by him. But if there had been any doubt upon that question, I think that the defendants have themselves removed that doubt. They have confessed judgment for these costs. If they had paid the costs, they never could have set up the illegality of the agreement in respect of the costs as against the recovery of the remainder of the purchase-money, and I \*think that, having given judgment for the costs, they have excluded themselves from any such ground of defence.

I therefore concur in what my learned brother has said as to the payment of the 1750*l.*, and the costs of the suit.

### PARKER *v.* TASWELL.

1858. May 27, 28. Before the Lord Chancellor Lord CHELMSFORD.

The Act 8 & 9 Vict. c. 106, § 3, does not prevent an instrument which (as containing words of present demise, and not being under seal) is void as a lease from being used as an agreement.<sup>1</sup>

Where terms for letting farms provided that all materials required for buildings

<sup>1</sup> See 1 Sugden V. & P. (8th Am. ed.) 495, 496; 1 Dart V. & P. (4th Eng. ed.) 184. As to the distinction between a present demise and an agreement for a lease, see Kabley *v.* Worcester Gas Light Co., 102 Mass. 392; McGrath *v.* City of Boston, 103 Mass. 369; Bacon *v.* Bowdoin, 22 Pick. 401; Taylor Land. & Ten. § 39.

proposed to be built, or that might thereafter be built, should be led at the expense of the tenant; that the landlord should drain, the tenant leading tiles; that gates, buildings, " &c., " should be left in repair by the tenant, the landlord finding new gates when required; that the landlord reserved to himself all customary rights and reservations, such as liberty to cut and plant timber, search for and work mines or minerals, " &c., " allowing the tenant for any reasonable damage: *Held*, that these stipulations did not render the agreement uncertain, so as to be incapable of being enforced specifically.<sup>1</sup>

Although specific performance of an agreement may not be enforced against a defendant who reasonably misunderstood its terms, a mere case of inadvertent omission to propose an intended term is different; and therefore where an occupant of land under an expiring tenancy had always paid the tithe rent-charge, and afterwards entered into a written agreement with the landlord for a lease at the old rent, but without any stipulation being introduced as to the tithe rent-charge: *Held*, that the landlord could not insist on such a stipulation being inserted as a condition of specific performance being enforced against him.

THIS case came on upon an appeal and cross appeal from the decree of Vice-Chancellor STUART directing the specific performance of the following agreement.

" Conditions of letting Wether Hill and Moory Farms in the parish of Winstone and county of Durham.

" An agreement made between John Wood, of Stanwick Park, Yorkshire, agent for and on behalf of George Morris Taswell, Esq., of St. Martin's, Canterbury, of the one part, and Robert Parker the younger, of Wether \* Hill, and Robert \* 560 Parker the elder, of Kerry Hill, both in the county of Durham, of the other part.

" The said John Wood agrees to let, and the said Robert Parker, Jr., and Robert Parker, Sen., agree to take for a term of ten years, commencing at May Day, 1856, the farms above mentioned and now in their occupation.

" The rent for the first five years ending May Day, 1861, in consideration of the extra leading for new buildings, to be 240*l.* per annum; and the remaining five years, ending May Day, 1866, to be 270*l.* per annum, to be due at Michaelmas and Lady Day, and paid half-yearly in the middle of March and September

<sup>1</sup> See 1 Sugden V. & P. (8th Am. ed.) 213, 214; South Wales Railway Co. v. Wythes, 5 De G., M. & G. 880, and note (1); 1 Dart V. & P. (4th Eng. ed.) 203, 204; 2 Ibid. 945, 946; Price v. Griffith, 1 De G., M. & G. 80, and note (1); Fry Specif. Perf. (2d Am. ed.) 165 *et seq.*

respectively, except the last half-year's, which must be paid previous to the tenancy expiring.

"The leading of all materials required for buildings proposed to be built, or that may hereafter be built, or for the repair of buildings, to be done at the expense of the tenant.

"The whole of the old grass land to remain and be left in grass, excepting No. 8 on the plan, which has to be ploughed out; and the north side of No. 26, now in tillage, to be laid to permanent pasture, being first well cleaned, limed, and sown with turnips, to be eaten on the land with sheep, the landlord to find the seeds.

"The tillage land on the north side of the railway to be cultivated under a five-course system, viz., oats, fallow, wheat, to be sown with seeds, and clover, and to be pastured two years; the remaining part of the tillage land to be cultivated according to good husbandry, but \* in no case shall two white crops in succession be taken off any portion of the land.

\* 561 "The tenant to lead not less than sixty loads of clod lime in each year, to be applied to the fallow and turnip land as it may come in course.

"No hay, straw, or turnips to be sold off the farms, but the whole to be consumed and properly converted into manure for the use of the said farms; and the last year of the tenancy all manure made after the 23d day of November, to be left for the use of the landlord or succeeding tenant.

"The landlord to drain, the tenant leading tiles and paying five per cent per annum upon all sums so expended.

"New hedges to be made and planted by the landlord, the tenant to keep them clean and properly protected.

"Gates, buildings, &c., to be left in repair by the tenant, the landlord finding new gates when required.

"The seeds and clover to be sown in the spring of the year preceding the expiration of the tenancy, to be allowed and paid for by the landlord or succeeding tenant; provided the same shall not have been eaten after the corn has been cut.

"The landlord or succeeding tenant to have liberty to sow with seeds and clover that portion which comes in course in the spring of the last year before the expiration of the tenancy, to harrow or roll in the same, provided it can be done without injury to the outgoing tenant.

"The landlord reserves to himself all customary rights and reservations, such as liberty to cut and plant timber, \* search for and work mines or minerals, &c., allowing the tenant for any reasonable damage that may accrue.

"The tenant to be entitled to an away-going crop of corn, amounting to two-fifths of the tillage land on the north side of the railway, and to one-half of the tillage on the south side, excepting from the field marked No. 8 on the plan, which must be subject to the amount laid to permanent pasture in lieu thereof.

"ROBERT PARKER, Jr.,

"ROBERT PARKER, Sen.

"JOHN WOOD,

"Agent for and on behalf of G. Morris Taswell, Esq.  
"Darlington, December 24th, 1855."

Mr. Parker the younger had been in possession of the farms since the year 1850, under an agreement which had expired before the date of the agreement now in question, and which contained no provision with reference to the payment of the tithe rent-charge to which the property was subject. Mr. Parker the younger, however, had never disputed his liability to pay it under the former agreement, but had always paid the charge during the time he held under that agreement, which was up to the 1st of May, 1856.

After the execution of the agreement in question, Mr. Taswell proceeded to erect certain farm buildings on the farms, Mr. Parker the younger being, according to the agreement, at the expense of carrying the stone for that purpose. There was a conflict of testimony as to the place from which it had been understood that this stone was to be brought, Mr. Parker maintaining the understanding to have been that it was to be taken from quarries on the farm, while Mr. Taswell insisted that he \* might require \* 563 it to be brought from other land of his own at a distance.

For some time, however, after the execution of the agreement no dispute occurred ; Mr. Parker the younger continuing to occupy the farms and to lead the stone from quarries on the farm. In May, 1856, Mr. Wood, as Mr. Taswell's agent, filled up the quarries on the farms, and required Mr. Parker to lead the stone required for the buildings from a quarry called Dun House Quarry, at a distance of three miles and a half from the farms.

Disputes then arose, and Mr. Taswell served on Mr. Parker notice to quit, and subsequently brought an action of ejectment against him, whereupon the present suit was instituted by Mr. Parker the younger, who by his bill stated that the buildings in the agreement described as proposed to be built were certain buildings which the defendant through his agent had, previously to the execution of the agreement, stipulated to erect on the farms; and that during the negotiations for the lease it was by the defendant's agent stated and represented to the plaintiff and Robert Parker the elder that the stone to be used in the said buildings would be raised or gotten from quarries situate within the farms. The bill further stated that disputes had arisen between the plaintiff and the defendant's agent on the subject of leading the stone, and that the defendant's agent had stopped the works connected with the buildings. The bill also alleged that Robert Parker the elder, who was made a defendant, was merely a surety in the agreement, but was ready and willing on his part specifically to perform it, by concurring in the execution of the lease. The prayer was for specific performance, and for an injunction against further prosecuting the action of ejectment.

\* 564 \* The defendant by his answer stated, that in the months of September and October, 1855, a negotiation took place between the plaintiff and Mr. Wood as to renewing the tenancy of the farms, and that it was at first suggested that the new term should be seven years, but that afterwards, at the express desire of the plaintiff, and in consideration of his having to lead or carry the building materials, Mr. Wood, as the defendant's agent assented to its being for ten years, and that at that time the defendant contemplated building a portion of the farmstead and buildings, and erecting some new buildings upon the farms; that nothing was expressly said about the tithe rent-charge when the document of the 24th of December, 1855, was signed; but that during the negotiations between the plaintiff and Mr. Wood in September and October, 1855, it was stated and admitted by the plaintiff himself on several occasions, and that Mr. Wood distinctly understood and fully considered at the time of signing the agreement, that the tithe rent-charge was to be paid and borne by the tenant, as had been always previously the case, and that Mr. Wood executed the said document upon that understanding; that the terms proposed were communicated by Mr. Wood to the defendant,

who informed Mr. Wood of his approval thereof before the agreement was signed, but that his approval was given upon the full belief and understanding that the tithe rent-charge would continue to be paid by the tenant. After stating the defendant's version of the facts as to leading the stone, the answer concluded by submitting:—

1st. That the document of the 24th of December, 1855, purported to be and was intended by all parties to be an actual demise of the premises for a term exceeding three years, and that by reason of the same not being under seal, the same under the conjoint operation of the \* Statute of Frauds, and of the \* 565 Act of the 8 & 9 Vict. c. 106, was absolutely void at law and in equity.

2d. That assuming the said document to be otherwise valid in equity as an agreement, the same nevertheless was such as could not be specifically enforced in equity by reason of the vagueness and uncertainty of its terms, and also by reason of its omitting in respect to the payment of the said tithe rent-charge to express the real understanding and intention of the parties thereto.

3d. That assuming the said document to be valid in equity as an agreement, and capable of being specifically enforced, specific performance thereof ought nevertheless not to be enforced in equity by reason of the plaintiff having refused to perform his obligations thereunder in respect to the leading of the stone, and of his having refused to allow the said new buildings to be proceeded with.

4th. That in case the said document was to be considered a valid agreement in equity, and the plaintiff was to be held to be entitled to a specific performance thereof, he ought to obtain such relief only upon the terms of himself consenting and procuring the defendant Robert Parker the elder to consent to pay the said tithe rent-charge as from the commencement of the term, and covenanting so to do in and by the lease to be granted of the said premises, and paying the costs of that suit.

The plaintiff by his affidavit in reply denied that the rent of £240 for the first five years of the term was (as represented by Mr. Wood in an affidavit made by him) a reduced rent for the

farms, for he said, that the rent under the former lease or  
\* 566 agreement was 240*l.*, and that \* at the time the new agree-  
ment was entered into, the quantity of land in the farms had  
been reduced by about five acres sold off by the defendant Taswell  
to a railway company for 1,100*l.* including severance, so that the  
rent of 240*l.* payable under the new lease or agreement was even  
after the deduction of the tithe rent-charge fully equivalent to the  
former rent of 240*l.* without such deduction, and that the rent of  
270*l.* payable for the last five years of the term was an advance  
upon the former rent in consideration of the new buildings and  
other improvements to be erected and made by the landlord. He  
further deposed that the instrument of the 24th of December,  
1855, was an entirely new lease or agreement, having no reference  
whatever to the former one, the circumstances being altered as  
before stated; that it was drawn and prepared by Mr. Wood him-  
self; and that the deponent considered at the time when he signed  
it, that he would not be liable under it to the payment of the  
tithe rent-charge, although he had no recollection of any thing  
having been expressly said on the subject.

The decree under appeal declared that the agreement of the 24th  
of December, 1855, ought to be specifically performed. It decreed  
the same accordingly, and directed the defendant George Morris  
Taswell to execute to the plaintiff and to the defendant Robert  
Parker the elder a lease of the farms comprised in the agreement  
according to the terms of it, and that such lease should contain a  
covenant on the part of the plaintiff and the defendant Robert  
Parker the elder to pay the tithe rent-charge payable in respect of  
the farms, such lease to be settled by the Judge in case the parties  
differed, and his Honor gave no costs on either side up to that  
time.

\* 567 The defendant appealed from the decree, so far as. \* it  
directed specific performance, and the plaintiff appealed  
from so much of it as directed that the lease should contain a  
covenant on the part of the plaintiff and the defendant Robert  
Parker the elder to pay the tithe rent-charge and as declared that the  
Court did not think fit to give any costs.

*Mr. Malins* and *Mr. Prendergast*, for the plaintiff.—The docu-  
ment, although not a deed, and consequently not valid as a lease,

is nevertheless valid as an agreement, nor is there any uncertainty in its terms, so as to preclude a specific performance. There was, however, no ground for adding to the decree, as the Vice-Chancellor has done, a term which was never agreed upon, viz., that the lessee should pay the tithe rent-charge, nor ought the plaintiff to have been deprived of his costs.

They referred to and commented upon *Pain v. Coombs*, (a) *Wood v. Scarth*, (b) *Powell v. Lovegrove*, (c) *Fenner v. Hepburn*, (d) *Dowell v. Dew*, (e) *Mundy v. Jolliffe*, (g) *Gregory v. Mighell*. (h)

*Mr. Dart* (with whom was *Mr. Bacon*), for the defendant.— This is not an agreement for a lease; it was intended to be a present demise, and it is either that or nothing. But as a present demise it is void by the 8 & 9 Vict. c. 106, § 3, not being by deed. *Stratton v. Pettit*, (i) *Barkworth v. Young*, (k) *Leroux v. Brown*. (l) It is also bad for uncertainty, the two “&c.” are of themselves sufficient to invalidate it in this respect. *Price v. \* Griffith*, (m) *Hayward v. Cope*, (n) *Brace v. Wehnert*, (o) *Williamson v. Wootton*, (p) *Taylor v. Portington*, (q) *Manser v. Back*, (r) *Alvanley v. Kinnaird*, (s) *Wood v. Scarth*, (b) *Stapylton v. Scott*. (t)

Even if it could be enforced, it could be only on the terms which the Vice-Chancellor has imposed, if indeed a mutual mistake should not rather avoid the contract altogether. *Higginson v. Clowes*, (u) *Townsend v. Stangroom*. (v)

[THE LORD CHANCELLOR.— Has that principle ever been applied in a case where a matter had been entirely overlooked on both sides?]

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|--------------------------|-------------------------------|
| (a) 1 De G. & J. 34.     | (m) 1 De G., M. & G. 80.      |
| (b) 2 K. & J. 33.        | (n) 4 Jur. N. S. 229.         |
| (c) 2 Jur. N. S. 791.    | (o) 6 W. R. 425.              |
| (d) 2 Y. & C. C. C. 159. | (p) 3 Drew. 210.              |
| (e) 1 Y. & C. C. C. 345. | (q) 7 De G., M. & G. 328.     |
| (g) 5 Myl. & Cr. 167.    | (r) 6 Hare, 443.              |
| (h) 18 Ves. 328.         | (s) 2 M. & G. 1.              |
| (i) 16 C. B. 420.        | (t) 13 Ves. 427.              |
| (k) 4 Drew. 1.           | (u) 15 Ves. 516.              |
| (l) 16 Jur. 1021.        | (v) 6 Ves. 328; 3 Ves. 38, n. |

That must be regarded as a mistake.

[THE LORD CHANCELLOR.—Or rather accident.]

*Mr. Malins*, in reply.

THE LORD CHANCELLOR.—This is an appeal from a decree of Vice-Chancellor STUART, by which it is ordered. [His Lordship read the decree.]

The plaintiff has appealed from that part of the decree which relates to the tithe rent-charge and the costs, and the defendant has appealed from so much as directs specific performance; so that the whole of the questions between the parties are brought before me for adjudication.

\* 569 \* The bill was for the specific performance of an agreement. The plaintiff, Robert Parker the younger, and his father (one of the defendants), had been tenants of the other defendant Taswell, under a tenancy which would expire on the 1st of May, 1856. On the 24th of December, 1855, the agreement in question was entered into, and was signed by the two Parkers and by John Wood, as agent for the defendant, but not sealed. [His Lordship read it.]

The plaintiff continued in possession after the expiration of his former tenancy, but shortly afterwards a dispute arose upon the clause in the agreement as to leading the materials for the buildings, the plaintiff insisting that there was an understanding that the stones should be got on the farm, and the defendant requiring them to be had from Dun House Quarry, which was two or three miles distant. Letters were written on the subject of this dispute on the 17th and 31st of May, 1856; but nothing further was done until January, 1857, when a formal demand of possession was made; and an ejectment was brought by the defendant on the 19th of January, 1857.

On an application being made to the Vice-Chancellor for an injunction to restrain the defendant from proceeding in the action, his Honor ordered the question to stand over till the hearing, and on the hearing the decree was pronounced from which the appeals have been brought.

The better course will be to consider, first, the objection to the claim of the plaintiff for specific performance, on the ground of

there being no agreement which the law will recognize. This objection is founded on the 8 & 9 \* Vict. c. 106, § 3, \* 570 which provides that a lease of any tenements or hereditaments shall be void at law, unless made by deed. On the part of the defendant it is insisted that this document was intended for a lease, and that therefore if it is void for that purpose, it cannot be used as an agreement. The case of *Stratton v. Pettit* (a) is cited in support of their argument. That case, however, is merely an authority to show that the intention of the parties to be collected from the language of the instrument was, that it should take effect as a lease, and that it was void as such by the 3d section of 8 & 9 Vict. c. 106, not being by deed.

But the instrument now in question could not amount to a lease, because it was not signed by an agent lawfully authorized by writing, nor was it signed in the name of the principal, so as to render it a lease binding upon the lessor. Assuming, however, that it had been signed in the name of the lessor, and would therefore have amounted to a lease, as containing words of present demise, yet there is nothing in the Act to prevent its being used as an agreement, though void as a lease because not under seal.

The legislature appears to have been very cautious and guarded in language, for it uses the expression "shall be void at law,"—that is, as a lease. If the legislature had intended to deprive such a document of all efficacy, it would have said that the instrument should be "void to all intents and purposes." There are no such words in the Act. I think it would be too strong to say that because it is void at law as a lease, it cannot be used as an agreement enforceable in equity, the intention of the parties having been that there should be a \* lease, and the aid of \* 571 equity being only invoked to carry that intention into effect.

The second objection which is made to a decree for specific performance is uncertainty in the terms of the agreement, and it is urged, that having regard to the principles on which a Court of Equity acts, it is impossible to decree specific performance of such an agreement as this. The parts of the agreement particularly referred to are those providing that the leading of all materials

required for buildings proposed to be built, or that may hereafter be built, to be done at the expense of the tenant. That gates, buildings, " &c." are to be left in repair by the tenant, and that the landlord reserves to himself all customary rights, such as liberty to search for and work mines, minerals, " &c." With respect to the first of these provisions, there appears to me no difficulty. It must be borne in mind, that this agreement has been partly executed by possession having been taken under it ; and there are many authorities to show that in such a case the Court will strain its power to enforce a complete performance. I do not think that the stipulation as to leading materials obliges the tenant actually to do this particular work. Its meaning, I think, is, that he may do it if he please, and the effect of the stipulation is, in my opinion, only to throw the expense of the work on the tenant, by whomsoever it may be done. If the tenant do not choose to perform it, the landlord may, bringing the materials from a reasonable distance, charging the tenant with the expense. With respect to the agreement to keep in repair the gates, " &c.," this stipulation also appears to me capable of being construed with reasonable certainty by reference to the custom of the country, and the same observation applies to the reservation of customary

rights in favour of the landlord. The agreement moreover

\* 572 is \* admitted to be sufficiently certain as to all the substantial parts of it, and the only portions of it to which uncertainty is attributed are subordinate matters. No authority has been cited to show that in such a case specific performance may not be decreed.

In *Taylor v. Portington*, (a) which is relied upon on behalf of the defendants, there was nothing whatever to show how the Court could give effect to the provision that the drawing-rooms should be handsomely decorated according to the present style, nor was this provision an insignificant part of the contract, or a mere subordinate matter. It was the principal object, and introduced so much uncertainty, that the Lords Justices (disagreeing with the Master of the Rolls) held, and it appears to me correctly, that it would be impossible for the Court to carry into effect an agreement of that kind. Here the alleged uncertainty is in subordinate matters only, and the contract has been partly executed.

(a) 7 De G., M. & G. 328 [(Am. ed.) note (1) and cases cited].

But it is further alleged on the part of the defendant, that there has been such a breach of the agreement by the plaintiff as disentitles him to claim specific performance. It is said, that he has refused to lead the stone for the buildings, in violation of his engagement for that purpose. There is conflicting evidence as to the place from which the stone was to be taken, and also as to the quality of the stone upon the farm, and whether it was fit for building or not.

But it is unnecessary to decide these questions of fact, because if my view of the result of the evidence on both these points were adverse to the plaintiff, it would not affect my decision. I will suppose the clause as to \* leading materials converted \* 573 into a covenant in a lease. Such a covenant would stipulate, not that the plaintiff should lead the materials, but that they should be led at his expense.

He is, as I have already said, according to my view of the agreement, to do it or cause it to be done; but if he omits or refuses to lead the materials, the defendant may do this, bringing them from a reasonable distance, and charging him with the cost. But even assuming it to be a covenant on his part to lead the materials, would his refusal amount to such a breach as to disentitle him to specific performance? I think not. The authorities cited seem to show that the Court will not refuse its aid, unless the breaches of the agreement are gross and wilful. *Hare v. Burgess*, (a) *Gregory v. Wilson*. (b) Now it is impossible to say that there has been any wilful breach on plaintiff's part. There was a dispute as to the intention, and each party acted according to his own view. If there were any doubt upon the subject, the proper course to be adopted would be either to antedate the lease or prevent the lessee from setting up the date, so as to defeat an action at law, according to the cases cited of *Powell v. Lovegrove*, (c) and of *Pain v. Coombs*. (d)

But in the present case such a course is quite unnecessary, as I do not think that if this stipulation were converted into a covenant according to the intention of the parties, and the plaintiff were to refuse to lead the stones, it would be a cause of forfeiture, to which a proviso for re-entry would apply. I think, therefore, that

(a) 5 W. R. 585.

(c) 2 Jur. N. S. 791.

(b) 9 Hare, 683.

(d) 1 De G. & J. 34 [Am. ed. note (2)].

\* 574 the defendant's objections to specific performance, on \* the grounds of the alleged want of an agreement enforceable in equity, uncertainty, and breach of covenant, fail.

Then we come to the question, on the appeal of the plaintiff, as to the insertion of a covenant in the lease for payment by the tenant of the tithe rent-charge. It is admitted that the agreement as it stands, and supposing it to be a final one, would not entitle the defendant to insist on any payment in respect of the tithe rent-charge. The 80th section of the Tithe Commutation Act provides that every tenant or occupier who shall occupy any lands by any lease or agreement made subsequently to the commutation, and who shall pay any tithe rent-charge, shall be entitled to deduct the amount thereof from the rent payable by him to his landlord, and shall be allowed the same in account with the landlord; so that under the Act the plaintiff would not have been bound to pay the tithe rent-charge. And with respect to the understanding between the parties, I think that there has been a great deal of unfounded assumption in the argument. There is no evidence to show that the subject of the tithe rent-charge entered into the contemplation of either party. If we go beyond the limits of the written agreement, we enter upon the region of conjecture and speculation.

Reasons are suggested on behalf of the defendant to show a probability of intention that the tithe rent-charge should be paid by the tenant, and first it is said that the amount of the rent shows that this must have been the understanding. But this is not, I think, sufficiently clear. It is said that 240*l.* is the same amount as that paid by the tenant under the previous holding, when he paid the tithe rent-charge, although, as it is said, the value of the farms had increased. This may, however, possibly be \* 575 a \* sufficient rent; for the state of the buildings must be considered, and it must also be remembered that some parts of the farms, amounting to four or five acres, had been taken away from the farms, having been purchased by a railway company.

On the whole, there seems no sufficient inference to be derived from the amount of rent to induce me to say that the defendant or his agent must, as a matter of necessary implication, have understood that the tithe rent-charge was to be paid by the tenant. On the other hand, the opinion or understanding of the plaintiff was that the rent was to be paid without liability on his part to the

payment of the tithe rent-charge. I think that I am bound to act in these circumstances entirely on the written agreement. It seems to me not a case of mistake at all, but a case in which the agent of the landlord had overlooked the subject of the tithe rent-charge, and in which nothing was specially agreed upon between the parties on the subject. Why am I to assume that if the subject of the tithe rent-charge had been brought forward, the tenant would have agreed to pay the 240*l.* and the tithe rent-charge in addition? I have nothing to act upon but presumption and conjecture, which would be very unsafe grounds for a decision. Here is a substantive agreement, which speaks in sufficiently clear terms for itself, and contains no reference to any other instrument or to any pre-existing relation, and I am called upon to suppose that a term of importance, such as the payment of the tithe rent-charge, was intended to be inserted in the agreement, and that, if the agreement is to be specifically performed, I must insert in the lease a covenant for payment of the tithe rent-charge.

In all the cases which have been cited on this point, there was clear evidence of mistake. Here there is no \* evidence \* 576 that the parties intended any thing, except to leave the payment of the rent-charge to be made according to the Act of Parliament. That being so, I regret very much that I am unable to agree with that part of the Vice-Chancellor's decree in which he directs the insertion of a covenant for the payment of the tithe rent-charge.

This brings me to the last question, that as to costs. I confess that I have difficulty in arriving at a satisfactory judgment on this part of the case; but I think that I ought to give the plaintiff the costs of the suit. In January, 1856, the defendant demanded possession and brought ejectment. The tenant was placed in such a position that he was obliged to come to this Court, not only for an injunction, but to enforce his own rights. Then, if the plaintiff is entitled to specific performance, and compelled to come to this Court by the refusal of the defendant to do him justice, why is he to be deprived of his costs? The litigation is, I think, owing to the conduct of the defendant, who might have led the materials and claimed the expenses from the plaintiff.

\* 577 \*In the Matter of The WEST HAM DISTILLERY COMPANY, LIMITED.

WHITTET'S CASE.

1858. May 31. Before the LORDS JUSTICES.

A joint-stock company being in course of formation under 19 & 20 Vict. c. 47, W. applied for shares by a note in writing, by which he agreed to accept them and pay the deposit on them, if allotted to him. Shares were allotted to him accordingly, and he paid the deposit, but no certificates were given to him. His name was not entered in the register of shareholders, but only in a book in which the names of persons to whom shares had been allotted were inscribed, the shares to which they were entitled not being distinguished therein by numbers, as required by the 19th section of the Act. An order having been made in the following year for winding up the company, —held, that the register ought to be amended by inserting the name of W., and that he ought to be on the list of contributories.<sup>1</sup>

THIS was an appeal from a decision of Mr. Commissioner FANE, fixing the appellants as contributories in the list as settled by him.

The company was formed in June, 1856, as a limited company, with a capital of 200,000*l.* in 20,000 shares of 10*l.* The memorandum and articles of association were filed on the 24th of June in that year, and the certificate of incorporation was given by the registrar on the 26th of July. The first clause of the articles provided, that no person should be deemed to have accepted any share in the company unless he testified his acceptance by writing under his hand.

On 3d June, 1856, the appellant Alexander Whittet sent to the provisional directors a letter in the following form:—

“To the Provisional Directors of the West Ham Distillery Co., Limited.

“Gentlemen,—I request that you will allot to me 15 shares of

<sup>1</sup> See Birch's Case, *ante*, 10, and note; Lofthouse's Case, *ante*, 69; 1 Lindley Partn. (Eng. ed. 1860) 135; 2 Ibid. 1154, 1155.

10*l.* each in the above-named company, and I hereby undertake to accept that number, or any less number of shares \* which you may allot to me, and pay the deposit of 2*l.* on \* 578 each share, and also to execute the deed of settlement and all necessary deeds of the company when required.

"A. WHITTET."

On 26th July, 1856, the directors returned the following answer : "The directors of the above company (which has obtained a certificate of incorporation with limited liability) hereby comply with your request dated 3d June, and allot to you 15 shares in this company on the terms and conditions contained in your letter of application. You are requested to pay the deposit of 2*l.* per share, amounting to 30*l.*, to Messrs. Hankey, the bankers to the company, on or before the 31st instant, otherwise this allotment will be cancelled. Certificates for the number of shares allotted to you will be given in exchange for this letter, and the receipt attached to it, upon your signing the memorandum indorsed hereon in conformity with the new Act of limited liability."

The indorsed memorandum was as follows : "I, the undersigned, being entitled to 15 shares in the capital stock of the West Ham Distillery Company, Limited, do hereby require to be registered as the holder thereof."

On 31st July, Mr. Whittet paid the deposit of 2*l.* per share, and attended at the office to obtain his certificates, but was told that none were ready, and that he should be informed when they were ready. No such information was ever sent to him, nor did he ever receive certificates or sign the memorandum indorsed on the letter of allotment. The case of the other appellants was precisely similar.

\* The company kept four books: (1.) The rough list of \* 579 shareholders containing the names of the allottees, and the number of shares taken by them respectively. This was a private book not shown either to shareholders or to the public. (2.) A share ledger, being an account of cash paid in respect of shares. (3.) A register of transfers of shares. (4.) A register of shareholders, being a register of persons who had received certificates of shares, and had by writing authorized the company to register them as holders.

The names of the appellants were entered in the first book;

but the shares belonging to them were not distinguished by appropriate numbers, no particular shares having ever been specifically appropriated to them. Their names did not appear in the 4th book.

On 4th August, 1857, the ordinary general meeting was held.

On 8th December, 1857, a list of persons described therein as shareholders was sent to the registrar of joint-stock companies. In this list the names of the appellants were inserted, but the shares held by them were not distinguished by appropriate numbers.

On 22d December, 1857, a petition was presented to the Court of Bankruptcy for winding up the company, and an order for winding it up was made. On 22d April, 1858, Mr. Commissioner FANE decided that the names of the appellants must be inserted in the list of contributories, from which decision this appeal was brought.

*Mr. Swanston and Mr. Clement Swanston*, for the appellants.—\* The appellants never received certificates of shares, nor gave any letter of license to register their names. Nor were they ever registered as shareholders. The requirements of 19 & 20 Vict. c. 47, § 19, have not been complied with, and the appellants cannot be treated as shareholders. It does not help the case against us that a list was sent in to the registrar which contained our names ; the names were not on the register, and we were entered as shareholders only in the rough list, which does not distinguish the shares by numbers. The appellants would, it is true, be contributories under the former law, but the statute is express, and prevents the old authorities from being applicable. The cases under 7 & 8 Vict. c. 110, show that the Courts have always exacted strict compliance with the forms required by the statute. *Baily v. The Universal Provident Life Association*, (a) *Moss v. The Steam Gondola Company*, (b) *The Waterford, Wexford, Wicklow, and Dublin Railway Company v. Pidcock*, (c) *Galvanized Iron Company v. Westoby*. (d)

*Mr. Selwyn and Mr. Roxburgh*, contra.—Every thing of substance has been complied with. What the appellants call the

(a) 1 C. B. N. S. 557.

(b) 17 C. B. 180.

(c) 8 Exch. 279.

(d) *Ibid.* 17.

rough list is a list of shareholders, and is enough to satisfy the requirements of the Act. At all events, it is clear that they ought to be liable, and the Court has, under the 25th section of the Act, the power of curing any accidental slip, by correcting the register, as in *Birch's Case*. (a) The directions as to registration of shareholders are directory only, and do not make every thing incomplete, till that has taken place ; if they did, those shareholders who are first \* registered would exclude the subsequent \* 581 ones. *Yelland's Case* (b) shows that a mere informality of this kind can be got over.

*Mr. Clement Swanston*, in reply.

[Their Lordships asked the appellants' counsel, whether they would consent to the matter being decided as if there had been before the Court an application to correct the register, and this consent being given,—]

THE LORD JUSTICE KNIGHT BRUCE.—I am of opinion, that the register ought to be amended by inserting in it the names of the appellants, and that they ought to be retained on the list of contributories.

THE LORD JUSTICE TURNER.—I am of the same opinion ; but I should have felt great doubt whether the appellants could have been retained on the list of contributories, had not the Act given the Court power to direct the register to be amended.

1858. May 5, 6, 7, 8. June 7. Before the LORDS JUSTICES.

J., being unable to pay the premiums of policies effected by him on his own life, gave to T. a *post obit* bond for 14,000*l.*, payable on the death of J.'s father if J. survived him, and if T. had in the mean time kept up the policies. In fixing the sum of 14,000*l.* regard was had not only to the amount of premiums

(a) *Supra*, 10. (b) 5 De G. & Sm. 395 ; affirmed 16 Jur. 509.

[ 457 ]

required to keep the policies on foot, but also to the amount of premiums to be paid for keeping the life of J. insured in the sum of 14,000*l.*, to be paid in the event of his dying in his father's lifetime. This was known to J., who knew also that T. intended to effect this latter insurance, but there was not any agreement that T. should do so. T. did effect the insurance. J. died in his father's lifetime, appointing T. one of his executors: *Held*, that no contract for T. to insure being proved, T., and not the estate of J., was entitled to the benefit of the policy which T. had effected.<sup>1</sup>

*Held*, also, that if the transaction as to the *post obit* bond was a fraud upon J., then T. had no insurable interest in J.'s life; the insurance office was not liable on the policy; and the sum insured could not, if paid by the office, be claimed by J.'s estate.<sup>2</sup>

THIS was an appeal by the plaintiff from so much of a decree of Vice-Chancellor STUART as dismissed the bill with costs as against the defendant Fryer, and as against the other defendants with costs, except as far as the bill prayed the common account of the estate of R. P. H. Jodrell, the testator in the cause, and an account of the dealings and transactions between the defendants Brade and Trulock and each of them and the testator in his lifetime.

The principal object of so much of the bill as was thus dismissed was to have it declared that a policy for 7000*l.* effected by Trulock on the life of the testator, and subsequently assigned to Fryer, and other policies also effected by Trulock on the testator's life, formed part of the testator's estate.

The testator was the eldest son of Sir Richard Jodrell, and, if he had survived his father, would, upon the father's death, have come into possession of considerable estates. By an indenture of

the 12th of March, 1853, he assigned to trustees upon trusts \* 583 for the benefit of the plaintiff Lady \* Isabella Freme, then his wife, a policy of assurance on his own life for 5000*l.* By an indenture of the 8th of February, 1854, he assigned to trustees upon similar trusts another policy on his own life for the sum of 5000*l.*, payable only in the event of his dying in the lifetime of his father. Towards the latter end of 1853, or the beginning of 1854, the testator found himself unable to pay the premiums on these policies, and an arrangement was come to by him with the defendants Brade and Trulock for the payment by them of what should become due for premiums, upon the terms of his giving them a bond paya-

<sup>1</sup> See *Bruce v. Garden*, L. R. 8 Eq. 430.

<sup>2</sup> See as to *post obit* bonds, 1 Story Eq. Jur. §§ 342-344.

ble in the event of his surviving his father. Accordingly in February, 1854, the testator executed a bond in the penalty of 28,000*l.*, which, after reciting the policies settled on the plaintiff, proceeded as follows : —

“ And whereas it hath been agreed between the said parties, that the said R. P. H. Jodrell should execute and give unto the said James Brade and Thomas Trulock a *post obit* bond for the payment of such a sum of money to the said James Brade and Thomas Trulock by the said R. P. H. Jodrell, in the event of his surviving his father, the said Sir Richard Paul Jodrell, to whom the said R. P. H. Jodrell is now heir-apparent, as ought to be paid on such event, calculated on supposing that the said sums (*a*) so paid by the said James Brade and Thomas Trulock would be lost by them, the said James Brade and Thomas Trulock, by the death of the said R. P. H. Jodrell in the lifetime of the said Sir R. P. Jodrell ; and whereas it hath been calculated by Mr. [REDACTED] the actuary of the [REDACTED], that the sum of 14,000*l.* ought to be paid to the said James \* Brade and Thomas Trulock, in the event \* 584 aforesaid : Now the condition of the above-written bond is such, that if the said Sir R. P. Jodrell shall depart this life in the lifetime of the above-bounden R. P. H. Jodrell, and if until the happening of that event the said J. Brade and T. Trulock shall have kept up all the payment and payments due in respect of such policies, and well and sufficiently keep the same on foot, and the said R. P. H. Jodrell, his heirs, executors, or administrators, do and shall within the space of seven days next after the decease of the said Sir R. P. Jodrell, well and truly pay or cause to be paid unto the said J. Brade and T. Trulock, their executors, administrators, or assigns, the sum of 14,000*l.* with interest for the same after the rate of 5*l.* per cent per annum, from the day of the death of the said Sir R. P. Jodrell, without any deduction or abatement whatsoever, then and in either of the said cases the above-written bond or obligation shall be void : Provided always, and the condition of the above bond further is, that if the said R. P. H. Jodrell shall at any time or times hereafter within the space of six calendar months next after the day of the date of the above-written bond or obligation, in case he the said Sir R. P. Jodrell shall be then

(*a*) No payment by Brade and Trulock had been previously referred to in the recitals.

living, be desirous of determining the above-written bond or obligation, and do and shall well and truly pay or cause to be paid unto the said J. Brade and T. Trulock, their executors, administrators, or assigns, the sum of 1000*l.* with interest for the same after the rate aforesaid from the day of the date of the above-written bond or obligation, together with all costs, charges, and expenses, but not exceeding in the whole the principal sum of 1500*l.*, which shall or may have been incurred or sustained by the said J. Brade and T. Trulock, their executors, administrators, or assigns, in or about insuring the life of the said R. P. H. Jodrell against the life of the said Sir R. P. Jodrell, with lawful \* 585 interest for the \* same sum or sums of money respectively after the rate aforesaid, from the time or respective times of paying or advancing the same, without any deduction or abatement whatsoever, then and in such last-mentioned case the above-written bond or obligation shall be void."

In this transaction, the understanding between Brade and Trulock was, that Brade should pay half the premiums on the policies for 5000*l.* and 5000*l.*, and also half the premiums on policies which it was their intention to effect on the life of R. P. H. Jodrell. Brade, however, was unable to perform his part of this arrangement, and another arrangement was come to between the testator and Brade and Trulock, under which the above bond was cancelled, and a new bond for the same amount was given to Trulock alone. This bond was dated the 16th of August, 1854; the penal sum was 28,000*l.*; it contained recitals of the policies settled on the plaintiff; and then it recited that "R. P. H. Jodrell, being unable to keep the policies on foot, has requested the said Thomas Trulock to do so for him, and he the said Thomas Trulock has consented and agreed so to do, upon the conditions hereinafter contained, to which he the said R. P. H. Jodrell has also consented and agreed." The condition of the bond was, "that if the said Sir R. P. Jodrell shall depart this life in the lifetime of the above-bounden R. P. H. Jodrell, and the said R. P. H. Jodrell, his heirs, executors, or administrators do and shall within the space of seven days next after the decease of the said Sir R. P. Jodrell well and truly pay or cause to be paid unto the said Thomas Trulock, his executors, administrators, or assigns, the sum of 14,000*l.* of lawful money of Great Britain, with interest for the same after the rate of 5*l.* per

cent per annum from the day of the death of the said Sir R. P. Jodrell, without any deduction or abatement \* whatso- \* 586 ever, and the said T. Trulock shall in the mean time and until the happening of such event have kept up the said two policies, and paid all the premiums due in respect thereof, then the above-written bond or obligation shall be void."

Before the first of these bonds was given, Trulock consulted an actuary of eminence as to the amount for which the bond ought to be taken, having regard to the ages of the testator and his father. The actuary advised that the transaction was one which could not be rendered safe, and that no satisfactory estimate could be made, but that the sum to be made payable ought not to be less than 12,832*l.* In making this calculation, the actuary took into account the premiums payable on policies to be effected on the life of the testator for insuring the sum of 14,000*l.*, to be payable in the event of his dying in the lifetime of his father, it being the intention of Brade and Trulock to effect such policies as a means of lessening the risk incident to the transaction.

At the time when the second bond was given, the testator also gave Trulock a mortgage on his reversionary interest in the family estate for securing the 14,000*l.* upon the same event as was mentioned in the bond, subject, however, to a prior mortgage in favour of the Norwich Insurance Company.

In the months of August and September, 1854, Trulock effected in his own name various policies of assurance on the life of R. P. H. Jodrell, for sums amounting in the whole to 14,000*l.* One of these was a policy for 7000*l.*, which was assigned to the defendant Fryer by way of mortgage.

The only evidence connecting the testator with the \* effecting of these policies, beside the proviso in the first \* 587 bond, was a letter written to him by Trulock on the 11th of August, 1854, shortly before the second bond was given. This letter, so far as is material, was as follows:—

"I think we shall yet manage the business proposed shortly, and as for the *post obit*, I am truly glad to say, that I shall not ask you to increase it, for although they come in very slowly, I still think we shall get the insurances done at a price which will not make any further risk so much as was expected, and I would

rather chance a little myself, than alter a bargain once made, especially between friends."

The testator died on the 12th of November, 1855, in the lifetime of his father, leaving a will by which he disposed of his real and personal estate upon trusts for the benefit of the plaintiff, and appointed Brade and Trulock his executors, who shortly after his death proved the will.

The defendant Trulock recovered at law upon two of the policies effected by him on the testator's life, one for 7000*l.* and the other for 2000*l.* The moneys payable under the others had not been received, and it appeared that they were still disputed.

The testator's widow, who had married again, filed the present bill by her next friend against Brade, Trulock, and Fryer, asking for an account of the personal estate of the testator, and of all dealings between him and Brade and Trulock, and that the trusts

of his will and of the settlements he had made of the policies  
 \* 588 effected by himself might be carried into execution. \* The bill sought for a declaration that the policies effected by Trulock formed part of the personal estate.

Vice-Chancellor STUART made a decree dismissing the bill with costs as against Fryer, and also dismissing it with costs as against Brade and Trulock, except so far as it sought the usual accounts of the testator's estate and an account of the dealings and transactions between him and Brade and Trulock. The plaintiff appealed.

*Mr. Rolt, Mr. Billon, and Mr. Neale* of the Common Law Bar, for the appellant, referred to *Lea v. Hinton*, (a) *Drysdale v. Piggott*, (b) S. C. on appeal, (c) and *Gottlieb v. Cranch*. (d)

*Mr. W. Pearson*, for Brade and Trulock, and *Mr. Craig* and *Mr. C. T. Simpson*, for Fryer.—Where there is an agreement, express or implied, that the creditor shall insure at the debtor's expense, the debtor, on paying the debt, is entitled to the policies: *Morland v. Isaac*, (e) *Drysdale v. Piggott*; (b) but nothing less

(a) 19 Beav. 324; 5 De G., M. & G. 823.

(b) 22 Beav. 238.

(c) 4 W. R. 772; 2 Jur. N. S. 1078.

(d) 4 De G., M. & G. 440..

(e) 20 Beav. 389.

will do : *Law v. Warren*, (a) *Ex parte Lancaster*, (b) *Gottlieb v. Cranch*; (c) and the Court will not readily infer a contract from slight circumstances. *Triston v. Hardey*. (d) In the absence of contract a mortgagee cannot charge a mortgagor with the expenses of insurance : *Dobson v. Land*; (e) the mortgagor therefore cannot have the benefit of the policy. If the transaction was a fraud on Jodrell, the result is that Trulock had no insurable interest in his life, so that the policies \* were void ; and \* 589 the fact that the offices have paid what they were under no obligation to pay does not give Jodrell's estate any right. *Henson v. Blackwell*, (g) *Law v. Warren*. (a) If A. commits a fraud on B., and then by means of the result of such fraud obtains a benefit from C., B. cannot recover that benefit from A. *Headen v. Rosher*, (h) *Potts v. Curtis*, (i) *Aldborough v. Trye*. (k)

*Mr. Rolt*, in reply.

Judgment reserved.

June 7.

The Lord Justice TURNER, after stating the nature of the appeal, said : —

The decree seems to be defective, (l) in not having directed an account of the testator's estate received by the plaintiff Lady Freme and her husband, the defendant Captain Freme ; and the general terms in which the bill has been dismissed seem hardly consistent with the other parts of the decree, for the dismissal extends to so much of the bill as prays the execution of the trusts of the settlements, but yet liberty is given to apply in chambers for the appointment of new trustees of those settlements. These, however, are no doubt mere accidental errors. The substantial question is,

- (a) 1 Drury, 31.
- (b) 4 De G. & Sm. 524.
- (c) 4 De G., M. & G. 440.
- (d) 14 Beav. 232.
- (e) 8 Hare, 216.

- (g) 4 Hare, 434.
- (h) McClel. & Y. 89.
- (i) Younge, 543.
- (k) 7 Cl. & Fin. 436.

(l) The answer of Brade and Trulock contained a statement, which was not contradicted, to the effect that the plaintiff and her husband had appropriated part of the personal estate of the testator and prevented the executors from receiving it.

\* 590 whether the policies of insurance referred to by the bill form part \* of the testator's estate. [His Lordship then stated the facts of the case, and continued as follows:—]

This bill is so loosely framed that it is difficult to collect from it the precise grounds upon which the plaintiffs claim to have the policies in question considered as part of the testator's estate; but in the course of the argument before us the claim was rested alternately upon the ground of fraud or of contract. As to the case of fraud, one part of the argument was that the whole transaction as to the security for the 14,000*l.* was fraudulent and void as against the testator; that Trulock had no insurable interest in the life of the testator otherwise than by virtue of that transaction; and that the insurable interest having been acquired by fraud, the benefit arising from it would result to the person on whom that fraud was committed. The first step in this argument is, that there was fraud in the transaction as to the security for the 14,000*l.*, but upon the evidence before us I am not satisfied that this was the case. I think, however, that if the question had been material, we could not have parted with it without further inquiry upon the subject; and we have to consider therefore whether, if the transaction as to the 14,000*l.* was found to be a fraud upon the testator, the result contended for by the appellant would follow. I am of opinion that it would not. If there was fraud upon the testator in the transaction as to the 14,000*l.*, the defendant Trulock could acquire by it no insurable interest in the testator's life, and the policies effected by him were frauds on the offices in which they were effected: the offices would not be liable on the policies. These policies either formed part of the original transaction as to the 14,000*l.* or they did not. If, as I think was the case, they did

\* 591 not form part of the original transaction, I can see no ground on which the testator's estate can claim the \* benefit of them upon the footing of fraud. If, on the other hand, they did form part of the original transaction, and we give the testator's estate the benefit of them upon this ground of fraud, we should, as it seems to me, be permitting the estate to affirm the transaction as to the offices and disaffirm it as to the estate, which cannot, I think, be done. It is true that some of the policies have been recovered upon at law, but this does not seem to me to aid the appellant's case. If fraud be established, and it is the case of fraud we are now considering, what has been recovered could not,

as I apprehend, be retained. It is, I think, to the offices, and not to the testator's estate, the money recovered would, in this view of the case, belong. There is, I think, a fallacy in the appellant's argument on this part of the case. It throws out of view all consideration of there having been a fraud upon the offices as well as upon the testator.

Then as to the case of contract, I find no proof of any express contract by Brade and Trulock, or either of them, for the insurance of the testator's life. The recital contained in the first of the bonds was relied on in proof of such a contract, but it seems to me to prove no more than that the premiums which would be payable for insurance were, as of course they would be, taken into account in determining the sum for which the bond was to be given. Nor does the proviso in this bond, as I think, afford any better proof of contract; it seems to me to show only, that, if insurances were effected, the bond was not to be determined under the proviso without the premiums being repaid. The letter of the 11th August, 1854, was also relied upon as evidence of such a contract; but again, this letter shows, as I think, no more than that the testator was informed that Trulock intended to insure, and that the amount of the bond was calculated on the rate at which the insurances were expected \* to be effected. There is indeed language in this letter which might be important on the question of fraud, had that question been material, but I do not think it all supports the case of contract. It is not, I think, couched in terms at all indicating that Trulock was under any obligation to insure; and if a contract was to be inferred from such a letter as this, there would hardly, I think, be any case in which the debtor would not be entitled to the benefit of the policies effected by the creditor. The bond and the letter to which I have referred constitute, as I believe, the only evidence which at all brings the testator in connection with these policies, and I think they are wholly insufficient to support the supposed case of contract.

It was also attempted on the part of the appellant to establish a right to these policies upon these grounds. It was said that the policies were effected upon the whole life of the testator, and not to meet the contingency mentioned in the bond; that they were collateral securities for the 14,000*l.*, and insured the payment of it

in any event ; and that it was a fraud to charge the testator with the 14,000*l.* for the risk of his dying in his father's lifetime, and at the same time to secure the payment of the 14,000*l.* in any event. But if there was no contract between the testator and Trulock in respect of the insurance, Trulock was surely at liberty to effect any insurance which he might think fit, and it is not to be wondered at that he insured the payment of the 14,000*l.* in any event, when it is remembered how large an incumbrance the testator had already created upon his expectant property in favour of the Norwich Insurance Office.

Another ground which was relied on upon the part of the \* 593 appellant was, that these premiums were paid out of \* the testator's own moneys ; but the policies, the benefit of which is claimed by this bill, were effected by Trulock alone ; and it does not appear that Trulock ever had any moneys of the testator in his hands except the 500*l.* which was due upon his promissory note, and which was due on a separate and distinct transaction. This note the testator continued to hold until the time of his death, and I think it would be going much too far to ascribe the payment of the premiums to the debt which was thus due from Trulock.

Upon the whole, therefore, I think the appellant's case altogether fails, whether it be considered as depending upon fraud or upon contract ; but I agree with what I understand to be the opinion of my learned brother, that the case fully justified inquiry, and that, except as to the defendant Fryer, the bill, so far as it has been dismissed, ought to have been dismissed without costs. In this respect, therefore, I think the decree should be altered ; but in other respects I think the appeal should be dismissed, but of course without costs.

The case of *Lea v. Hinton*, which was attempted to be drawn into the argument on the part of the appellant, has not, I think, any bearing upon the point before us. In that case, as we thought, not only had the policy been effected with the privity of the testator, but it had been effected, and the moneys due upon it had been received, for the purpose of indemnity merely ; and the estate, having been charged with part at least of the debt for which the indemnity was provided, was of course entitled to be credited with the indemnity fund.

THE LORD JUSTICE KNIGHT BRUCE.—The decree in this cause having been so drawn up as \* to omit the direction \* 594 of an account of the personal estate of the testator Mr. Jodrell, possessed by the plaintiff Lady Isabella Freme, and her present husband respectively, this defect must, I think, as the Lord Justice has said, be supplied, subject to which it appears to me that not one of the respondents has any ground of complaint against what has been done. It was right, as I conceive, to direct the accounts, or the accounts and inquiries, directed as to the defendants Messrs. Brade and Trulock, whether it would have been right to direct or do more against one or both of them or not.

The appellant's alleged grounds of complaint involve three questions: 1. Whether Mr. Trulock was a trustee absolutely or contingently of the whole or any part of the beneficial interest in the policy (of which the proceeds are in dispute) for the testator. 2. Whether there was a contract expressly or otherwise between them that absolutely or contingently the testator or his estate should have or be entitled to the whole or a portion of that interest. And 3. Whether, so far as the policy is concerned, the plaintiffs have the same rights, if any, against the defendant Mr. Fryer as against Mr. Trulock. I have expressed myself thus, because the payment or non-payment by the testator, or with his money, or the charge or absence of charge against him, of the whole or any part of the expense of effecting or keeping up the policy, is only material as evidence more or less strong on one or both of the two first questions that I have mentioned, of which neither can upon the materials at present before the Court (I agree with the Vice-Chancellor and the Lord Justice in thinking) be answered in favour of the plaintiff; and the impression which for some time I had, that it would have been better not to decide either of the two first questions against her, at least without an endeavour to obtain, by means of inquiries \* to be \* 595 directed, more information than we have as to the facts and circumstances of the dealings between the testator and the defendant Mr. Trulock relating to the policy, or connected directly or indirectly with it, does not remain. Upon consideration I have become convinced that there is not good ground for thinking that more information bearing materially upon the title to the policy than we have is likely to be obtained, or should be endeavoured to be so. Agreeing in this respect as well as on the subject of costs

with the views of my learned brother, I concur in the order that he proposes.

With regard to *Lea v. Hinton*, the Master of the Rolls, if I may take the liberty of saying so, seems to me to have dealt ably and well with the matter, but certainly I might have expressed myself better than I did on the appeal. According to my recollection, the evidence satisfied me that the effecting of the insurance there in dispute was, as between Mr. Lea and his solicitor, surety, and executor Mr. Hinton, their joint act, an act which the circumstances rendered it impossible to ascribe to any intention upon the part of either more favourable to Mr. Hinton than that of benefiting both, but as to Mr. Hinton, though primarily, yet by way only of protection and indemnity. I think that it was right to charge him with the money with which at the rolls as well as here he was charged. From his case that of Mr. Trulock now before us is widely and importantly different, as was that of the policy holder in *Gottlieb v. Cranch*.

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\* 596 \* SOMERSETSHIRE COAL CANAL COMPANY v.  
HARCOURT.

1858. May 24, 25; 26, 27. June 9. Before the Lord Chancellor Lord CHELMSFORD.

A canal company, having power to purchase lands for gross sums or for annual rent-charges, to be determined by commissioners in cases of disability, took possession of the lands of an infant, on an agreement with his steward, and after an award by the commissioners of the gross sum or annual rent-charge which ought to be paid, but which award was invalid, no one being party to it who had power to bind the infant's interest, the awarded gross sum was paid by the company to the steward, on an agreement for its return if the land were not conveyed to the company on the infant attaining his majority. No conveyance was executed, and the purchase-money was returned, but the company continued in the use of the land for their canal, paying to the land-owner, for forty years after he attained his majority, a rent of nearly the amount awarded by the commissioners. The company also with his knowledge purchased the interests of leaseholders in the lands: *Held*, —

1. That an agreement could not be presumed to have been entered into or ratified by the land-owner for a sale of the fee in consideration of a rent-charge.
2. That an action of ejectment brought by the land-owner and the intended exec-

tion of a bridge by him ought to be restrained by injunction, on the ground of acquiescence, the company undertaking to put in force their parliamentary powers (which had not expired) to acquire the land.<sup>1</sup>

THIS was an appeal from a decision of the Master of the Rolls, reported in the 24th volume of Mr. Beavan's Reports. (a)

The plaintiffs were the company of proprietors of the Somersetshire Coal Canal Navigation, incorporated in 1794 by an Act of Parliament, 30 Geo. 3, c. 86, for the purpose of "making and maintaining a navigable canal, with railways and stone roads, from collieries in Somersetshire."

By this Act the company were empowered (§ 1) to purchase lands for the use of the undertaking, and (§ 20) when such lands belonged to infants, to contract with their guardians for such purchase, the consideration for any purchase being either a sum of money at once to be paid, or an annual rent. No time was \* limited for the execution of the works by the company, unless a limitation could be inferred from the 22d section, which appointed as commissioners all persons residing in the counties of Somerset and Wilts possessed of a certain qualification.

The company proceeded under their Act to make their canals and railroads, and two lines were formed, one called the Dunkerton Line and the other the Radstock Line. For the purpose of forming the Radstock Line it became necessary, in the year 1797, to obtain a certain portion of the lands of the late Earl Waldegrave, who was then under the age of twenty-one years. It did not appear that the guardians of Lord Waldegrave had treated with the company, as they might have done under the Act, for the sale to the company of the lands required. An arrangement was, however, made for the company's obtaining possession of the lands with a Mr. Billingsley, the earl's land steward, and who was also one of the promoters of the company.

On the 6th of December, 1797, at a meeting of the commissioners, held in pursuance of the Act of Parliament, an award was made by them determining the value of the interests of Lord

(a) Page 571.

<sup>1</sup> See Kerr Inj. 42; 2 Story Eq. Jur. § 1549; Graham v. Birkenhead, &c., Railway Co., 2 Mac. & G. 146, note (2); Coles v. Sims, 5 De G., M. & G. 1 and note to the point of *acquiescence*; Child v. Douglas, 5 De G., M. & G. 739; Jennings v. Broughton, 5 De G., M. & G. 126.

Waldegrave in the lands proposed to be taken by the company. As to those in which leasehold interests existed, they determined the value, at thirty years' purchase, to be 246*l.* 12*s.* 6*d.*, out of which they found that the lessees were entitled to the sum of 81*l.* 5*s.* 11*d.* and Lord Waldegrave to the residue, amounting to 165*l.* 6*s.* 7*d.*; and that for the lands in his own possession he ought to receive the sum of 184*l.* 1*s.* 3*d.*, making a total of 349*l.* 7*s.* 10*d.*, which sum, or an annual rent of 14*l.* in lieu thereof, the commissioners decided ought to be paid to Lord Waldegrave.

\* 598 \* The sum of 349*l.* 7*s.* 10*d.* was paid by the company as the purchase-money for the earl's interest to Mr. Billingsley, on his undertaking to return it in default of a valid conveyance to the company not being executed on the earl attaining his majority. This event happened in March, 1807, and no conveyance having been executed, the 349*l.* 7*s.* 10*d.*, with eight years' interest, was returned to and received by the company.

Various transactions afterwards took place, which were relied upon by the company as amounting to a recognition of the award of the commissioners on the part of the earl, and as constituting an agreement which entitled the company to a conveyance, or which at least was such evidence of acquiescence as estopped the earl and those claiming under him from disturbing their possession; while the defendants, on the other hand, contended that the arrangements which were made from time to time only constituted a tenancy from year to year. It is not considered useful to enter into any detail of the transactions relied upon by the company as constituting an adoption by the earl of the award, and which were held both by the Master of the Rolls and the Lord Chancellor insufficient for that purpose, as they were of too special nature to afford the means of deducing from them any general principle.

In the course of these transactions, some questions of compensation were referred to the decision of the Rev. S. James, who, on the 7th of July, 1813, made a statement, headed "Particulars of Lord Waldegrave's Land, estimated at value per annum 13*l.* 16*s.* 10*d.*, to be paid by the Somersetshire Coal Canal Company, made by the Rev. S. James, 7th July, 1813." The statement set forth the particulars of Lord Waldegrave's lands used \* for the canal, with a description of each parcel and the quantities, and the rent per acre, amounting to a sum of 10*l.* 17*s.* 6*d.* Then other lands used for the canal were described in the same manner,

and at the foot of the description there were these words, "For these the canal company stand as lessees under Lord Waldegrave, and the rents affixed to each piece to take place on the death of the lives thereon." There was then a description of the lands, divided in a similar manner, which were used in the railways, and at the foot of the second description were the words, "These latter payable to the respective lessees, the rents affixed to each piece to be, on the death of the lives, paid to Lord Waldegrave." The whole statement was summed up in this way, "Rents now payable to Lord Waldegrave: Lands used in Canal Wharf, 10*l.* 17*s.* 6*d.*; lands used in railway, 2*l.* 19*s.* 4*½d.*; making 13*l.* 16*s.* 10*½d.*"

This sum of 13*l.* 16*s.* 10*½d.* was admitted on both sides to have been paid down to Lady-Day, 1824. But in the year 1823, a negotiation commenced which resulted in a fresh adjustment of the rent to be paid. In this negotiation, the company proposed to give up 4*a.* 0*r.* 17*p.* of the land which had previously formed part of their canal, but which were not then required for the purposes of their undertaking, and Mr. Langford, their clerk, wrote to Captain Waldegrave a letter of the 24th of March, 1823, containing this proposal, and stating the particulars of the lands used by the company. The letter contained this passage, "The commissioners fixed the rent of all the lands taken at 14*l.*;" and it proposed a deduction of 6*l.* 10*s.* 6*d.* in respect of the lands to be given up.

In May, 1826, the following written settlement was  
 \* come to, between the agents of the company and of the \* 600  
 earl.

"Radstock, 2d May, 1826.—Settlement of the rent account between Lord Waldegrave's trustees, and the Somersetshire Coal Canal Company, up to Lady-Day, 1826, from Lady-Day, 1824.

	£ s. d.
The perpetual annual rent to be paid to the trustees by the said company, as settled by the commissioners in 1797 . . . . .	14 0 0
Deduct for 4 <i>a.</i> 0 <i>r.</i> 17 <i>p.</i> of land given up by the said company to the trustees, being the old canal, Mr. Boddle's plantation, and Mr. Crew's garden, &c., as enumerated in statement sent to Captain Waldegrave in March, 1823 . . . . .	<span style="float: right;">8 10 6</span> <span style="float: right;">5 9 6</span> <hr style="margin-bottom: 5px;"/>
Add for 2 <i>a.</i> 0 <i>r.</i> 2 <i>p.</i> of land, being the railroads leading from Clansdown and Wilton . . . . .	<span style="float: right;">5 0 0</span> <span style="float: right;">10 9 6</span> <hr style="margin-bottom: 5px;"/>

	£ s. d.
<i>Amount brought forward . . . . .</i>	<i>10 9 6</i>
Deduct for 2a. 35p. of land, part of Draycott's, No 2 in company's plan, occupied by Mr. Dallamour, with the inn . . . . .	2 3 0
Also a piece of land, formerly Lansdown's, in front of the inn, and occupied by the said Mr. Dallamour. . . . .	0 6 6
	2 9 6
Future annual rent to be paid to the said trustees . . . . .	8 0 0
Settled by us, John Hill, for the canal company. M. Tucker, for the said trustees . . . . .	£8 0 0 2 years.
	£16 0 0 paid Mr. Tucker."

The arrangement referred to by this document was carried into effect. The four acres and seventeen perches were given up to Lord Waldegrave in 1824, and the 8*l.* per annum, the \* 601 reduced rent, continued to be paid down \* to 1846, when a dispute arose as to the form of receipt to be given.

In 1854 the defendants, who deduced their title from the earl, claimed to be the owners of the land, and gave the company notice to quit, upon which the company retorted by a similar notice to the defendants to deliver up the possession of the land, which had been relinquished to Lord Waldegrave in 1824.

The parties being thus at variance, the defendants first constructed a temporary bridge over the railway, and were proceeding to substitute for it a permanent bridge. They were also threatening to act upon their notice to quit by bringing an ejectment, when the company filed the present bill to have a conveyance of the lands, and to restrain the action of ejectment and the building of the permanent bridge.

The Master of the Rolls, by the decree under appeal, dismissed the bill with costs, so far as it sought a conveyance of the lands, but without prejudice to the right of the plaintiffs to a conveyance from the defendants of the lands then held by the plaintiffs under the defendants, when they should have taken the proper steps for determining the compensation to be given for the same and completing their title thereto and becoming the owners thereof under the Act, and without prejudice to the right of the plaintiffs to apply to the Court to determine the amount of such compensation, and for a conveyance of the same lands in the event of its appear-

ing that the powers contained in the Act for the purposes aforesaid could not then be put in force. And the plaintiffs electing, without prejudice to their right of appeal, to take such steps as might be necessary under the Act for determining the amount of such compensation for the lands and completing their title thereto and becoming the owners \* thereof, if the powers \* 602 for such purpose contained in such Act could then be put in force, and the defendants continuing the undertaking to abide by any order the Court might think fit to make with respect to restoring their works to the position in which they would have been if they had been stopped in obedience to an order for an injunction to be granted on the 8th day of May, 1856, and also undertaking to abide by any order the Court might thereafter make as to damages occasioned and to be occasioned to the plaintiffs in respect of the use of the bridges erected by them, and also to keep an account of all coals and goods carried by them, or permitted by them to be carried over the bridges since their completion,— his Honor did not think fit, until further order, to restrain the use of the bridges by the defendants. And as to so much of the plaintiffs' bill as was not dismissed, his Honor did not think fit to give any costs. And any of the parties were to be at liberty to apply to the Court as there should be occasion.

*Mr. Roundell Palmer, Mr. Osborne, and Mr. W. D. Lewis*, for the plaintiffs, referred to *Powell v. Thomas*, (a) *Duke of Devonshire v. Eglin*, (b) *Duke of Beaufort v. Patrick*, (c) *Master of Clare Hall v. Harding*, (d) *Ridgway v. Wharton*, (e) *Lord Cawdor v. Lewis*, (g) *Williams v. Earl of Jersey*, (h) *Rochdale Canal Company v. King*. (i)

*Mr. Selwyn and Mr. Fischer*, for the defendants, referred to *Duke of Leeds v. Amherst*, (k) *Collen v. Gardner*, (l) *De Montmorency v. Devereux*, (m) *Dann v. Spurner*, (n) *Pilling v. Armitage*. (o)

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| (a) 6 Hare, 300.                         | (e) 6 H. L. Cas. 238.    |
| (b) 14 Beav. 530.                        | (g) 1 Y. & C. Exch. 427. |
| (c) 17 Beav. 60.                         | (h) Cr. & Ph. 91.        |
| (d) 6 Hare, 273.                         |                          |
| (i) 16 Beav. 603; S. C. 2 Sim. N. S. 78. |                          |
| (k) 2 Phill. 117.                        | (m) 7 Cl. & F. 188.      |
| (l) 21 Beav. 540.                        | (n) 7 Ves. 231.          |
|  | (o) 12 Ves. 78.          |

\* 603 \* *Mr. R. Palmer*, in reply.

THE Lord CHANCELLOR.—This case, which is an appeal from a decree of the Master of the Rolls, was fully argued before me for three days, and from its difficulty, as well as its importance, I have been desirous of very carefully considering the various points involved in it before I delivered my judgment. It arises upon a bill filed by the plaintiffs, the company of proprietors of the Somersetshire Coal Canal Navigation, to obtain a reconveyance of certain lands and hereditaments which they allege they had contracted to purchase under the provisions of their Act of Parliament. And also to restrain the defendants from making a bridge over their railroad or tramroad, and from proceeding at law to recover possession of the lands in respect of which they claimed a conveyance.

The Act under which the company was incorporated is the 34 Geo. 3, c. 86. [His Lordship read the material parts of it.] It was suggested, in the course of the argument, that the 22d section appointing commissioners necessarily affixed a limit of time for the execution of the works, as all persons residing in the counties of Somerset and Wilts, possessed of a certain qualification, were, in the words of that section, thereby appointed commissioners, which, it was said, applied only to those who, at the time of the passing of the Act, were thus qualified. But as the functions of the commissioners are not confined to this particular period, but are to be exercised indefinitely from time to time, it seems to have been the intention of the legislature that all persons who at any time had the requisite property should be entitled to be sworn as commissioners. It was also supposed that the 33d section \* 604 might impose a \* limitation of time, after which all the compulsory powers of the company would cease. But this section is confined to injury and damage, and does not apply to the taking of lands for the purposes of the Act, and the injury or damage to which it refers is that which has been occasioned in the course of the execution of the works, not that which would necessarily be incident to and result from the nature of the undertaking.

[His Lordship proceeded to state the facts of the case nearly in the words of the above statement so far as it extends, and after stating the proceedings as to the valuation, his Lordship proceeded to say:] The whole was put an end to in the month of April,

1807, by Mr. Billingsley returning to the company the sum of 349*l.* 7*s.* which he had received on account of the earl, and in addition the amount of eight years' interest. At this period the parties stand in this position towards each other. The company were in possession of Lord Waldegrave's land, upon which they had made their canal and railroads; they had paid the lessees for their interest in that part of the land which was upon lease; Lord Waldegrave had received nothing for his interest in the lands, and he might, if he had pleased, have maintained an ejectment to recover possession. It was of course competent to him to have entered into a new agreement with the company for the sale of the lands, either for a gross sum or an annual rent; and the company, if no agreement had been made, might have proceeded to exercise the powers conferred upon them by their Act, and so have obtained an indefeasible right to these lands. Nothing of the kind appears to have been done on either side, but various transactions took place, which it is insisted on the part of the company amounted to a recognition of the award of the commissioners, or to a new agreement which entitled them to a conveyance, or which at least was such \* evidence of acquiescence as estopped the defendants from disturbing the possession of the plaintiffs; while the defendants, on the other hand, contended that the arrangements which were made from time to time only constituted a tenancy from year to year of the company to Lord Waldegrave.

In support of these opposite views it was urged, on behalf of the company, that it was unlikely they should have left themselves at the mercy of Lord Waldegrave, who might thus at any time have altogether stopped their canal and railway at his will and pleasure. For the defendants it was said, that Lord Waldegrave would hardly have consented to give the company absolute possession of the land for a small rent-charge, abandoning altogether the large claim which was supposed he might have for damage arising from severance. A very strenuous endeavour was made on the part of the company to reconcile these subsequent transactions with the award of 1797, and on the other hand irreconcilable differences between them were strongly urged by the defendants' counsel.

It appeared to me that the counsel for the company wholly failed in showing, with any thing approaching to certainty, that any of these transactions were conducted on the principle of deal-

ing with the award as binding, or with a view to the adjustment of the rights of the parties on that footing, although occasionally no doubt reference was made to the amount of rent ascertained by the commissioners as a criterion of what the company ought to pay for their possession of the land. For it must always be borne in mind, that, if the award was acted upon at all, it was by the receipt of a sum of money paid at once, and not by the alternative payment of an annual rent. It will be wholly unnecessary to go at length into all the \* transactions which

\* 606 occurred after the earl came of age, down to the period when this unfortunate dispute arose between the parties. [His Lordship adverted to the details of the several transactions relied upon, and to the statement of Mr. James, mentioned *ante*, p. 598.] With respect to that portion of the prayer of the bill which asks for a conveyance, I agree with the Master of the Rolls that the plaintiffs' case entirely fails. I cannot find either in the original award or in the subsequent transactions any definite, distinct contract for the acquisition of the lands, either under the provisions of the Act of Parliament or by voluntary agreement. They are not, however, in my opinion, precluded by the lapse of time from now proceeding under their Act to compel the defendants to sell them the lands which form part of their canal and railroads. I have already stated, that I find nothing in the Act which appears to me to limit the period within which the compulsory powers of the company may be exerted. The Master of the Rolls appears to have entertained the same view, although in the *Duke of Beaufort v. Patrick*, his Honor expressed an opinion that a clause almost identical in terms with the 33d section of the company's Act was a limitation of the period within which compensation could be assessed. By refusing the company a conveyance, therefore, the Court will not place them at the mercy of the defendants.

The defendants, however, contend that, even assuming that the company may still exercise their powers and obtain a parliamentary title to the lands (which they by no means admit), they are entitled intermediately to stand upon their rights to treat the company as their tenants from year to year, and to act upon the notice to quit which they have given. This makes it incumbent upon the Court to consider very carefully the relation in which

the parties here stand to each other, and the various \* transactions which have occurred between them since \* 607 Lord Waldegrave came of age. At that period he found the company in possession of his lands, which they had converted into a portion of their canal and railroad, and had used in this manner for a period of about ten years. Although these lands were essential to the existence of the canal, yet it would have been competent to Lord Waldegrave to have proceeded at once to remove them by ejectment. But he must have known perfectly well, that if he had done so the company would at once have availed themselves of the provisions of their Act, and have compelled him to sell them the lands. He therefore entered into arrangements with them, which, although not of a permanent character, were in substitution of what might at any time have been made permanent by the company. That the parties never could have contemplated a mere possession by the company, determinable at the will and pleasure of the earl, appears to me to be strikingly proved by the account of the 7th of July, 1813 (see *ante*, p. 598). The words after the enumeration of lands used in the canal and in the railroads, "for these the canal companies stand as lessees to Lord Waldegrave," &c., and "These latter payable to the respective lessees, &c.," are very significant of the views of the parties. The company had actually paid to the lessees the value of their interests in the lands used for the canal, and of course could not be disturbed as long as the leases endured; and although the rent payable to Lord Waldegrave stood on a different footing, yet by uniting them together in one statement, and comprehending them in one arrangement, he apparently contemplated their continuance for at the least the same period.

The question then arises, whether this state of things does not bring the parties within the principle of those \* cases \* 608 in which it has been held that a person who stands by and encourages an act cannot afterwards interfere with the enjoyment of what he has thus permitted to be done.

It is true that this is not exactly the case of a party having a right standing by and seeing another dealing with the property in a manner inconsistent with that right, and making no objection while the act was in progress, because — as was said by Lord COTENHAM in *Duke of Leeds v. Earl of Amherst* (a) — the act was

(a) 2 Phil. 128.

done when the earl was a minor, and when therefore "nothing of acquiescence can be imputed to him." But are not the parties in an equivalent position by the company having converted the earl's lands to the purposes of their canal, to which they were absolutely necessary, and using them day by day for this object without any attempt on his part to disturb them, he well knowing that if such attempt were made, they could compel him to sell them the land? The defendants cannot, in my opinion, after thus lulling the company into security and confidence, and preventing their exercise of the powers which they possess by law, suddenly turn round upon them and attempt to remove them from the lands which they have enjoyed for so many years. They must therefore be restrained from pursuing such an inequitable course, and endeavouring to act upon their notice to quit. But, on the other hand, the company ought not to be allowed to remain passive under the present embarrassing state of their relations with the defendants. They must take prompt measures for ascertaining the compensation to be paid to the defendants, and making themselves owners of the lands under the powers of their Act of Parliament.

\* 609 \* There only remains the question as to the bridge to be disposed of. The defendants can only be entitled to erect this bridge (without pursuing the course prescribed by the Act) on the assumption that the land is theirs, and that they have therefore a right to do what they please with it. If the company had made themselves owners of the lands by compulsory conveyance or voluntary agreement, the only mode by which the defendants could lawfully carry a bridge over the railway would be by adopting the course prescribed by the 51st section of the Act. But according to what has been already said, the defendants by their conduct here have precluded themselves from disturbing the company in the enjoyment of their lands for the canal and railway. They are equally prevented from doing any thing which would at all derogate from that state of things which they have established by their acquiescence. To act as owners of the lands, and to exercise rights which could only belong to them in that character, is to interfere with that possession of the company which the defendants have so long permitted and sanctioned. I think therefore that I ought to grant an injunction against the defendants to prevent them erecting or continuing any bridge over the railway.

And as, on refusing a conveyance to the company, I intimated,

that there was a course open to them, which would permanently secure them against the defendants: so, in preventing the defendants from erecting or continuing a bridge, I do not deprive them of a right hereafter of having one erected, if it is desirable for the enjoyment of their property. I refer both parties to the Act of Parliament by which alone their rights can be regulated and all their disputes and differences terminated.

\* But I cannot take leave of the case, without expressing \* 610 an earnest hope, that the parties will feel it to be for their mutual interest to enter into such an arrangement, as, while it establishes all their rights upon a permanent footing, will prevent the necessity of any further litigation, which has been rendered intricate and difficult, not from any hostility between them, but in consequence of the confidence with which they have been dealing with each other for more than half a century.

I must dismiss the appeal, so far as it is against the decree dismissing the bill so far as it prays a conveyance, with costs, and grant an injunction to restrain any proceeding by the defendants to disturb the possession of the company, and also to restrain the defendants from using the bridge over the company's railway, the company undertaking to proceed under their Act of Parliament to ascertain the compensation to be paid to the defendants for the lands occupied by them, and also the damage (if any) arising from severance, within three calendar months from this day.

As to the rest of the appeal, there will be no costs.

1858. June 8. Before the LORDS JUSTICES.

Two estates subject respectively to distinct first mortgages vested in different mortgagees were both again mortgaged to the same second mortgagees. Afterwards the two first mortgages were transferred to one person, with notice of the second mortgage: *Held*, that the transferee was, in a foreclosure suit instituted by him against the second mortgagee, entitled to tack the two first mortgages together.<sup>1</sup>

<sup>1</sup> See, as to the doctrine of tacking mortgages, *Watts v. Symes*, 1 De G., M. & G. 240, and cases in note (2); 1 Dan. Ch. Pr. (4th Am. ed.) 213; 1 Sugden V.

THIS was an appeal from the decision of Vice-Chancellor STUART, holding that John Jackson Lee, one of the defendants, was not at liberty to redeem one mortgaged estate without redeeming another.

One of the estates was in the parish of Calverley, in Yorkshire, and was originally mortgaged on the 2d of November, 1818, in fee by one John Cromack to Samuel Broadley for 2200*l*. By a deed of further charge between the same parties, the mortgage debt was increased to 2700*l*. In July, 1825, Samuel Broadley died, having devised estates of which he was mortgagee to his widow Elizabeth Broadley, and two other trustees.

The other estate was at Eccleshill, in the parish of Bradford, and was on the 26th of July, 1825, mortgaged by John Cromack to Elizabeth Broadley in fee for 1800*l*.

On the 21st of August, 1828, the equity of redemption in part of the Calverley property, and in the whole of the Eccleshill property, was conveyed to three joint-tenants in fee, of whom the defendant John Jackson Lee was the survivor, as a security for 500*l*.

The mortgage on the former estate was, in November, 1831, transferred to Mary Bacon.

On the 25th of October, 1853, the mortgages on both the \* 612 estates were transferred to the plaintiffs, with notice \* of the second mortgage, and they by their bill in the present suit sought to foreclose John Jackson Lee unless he paid the mortgages on both the estates.

*Mr. Malins* and *Mr. W. Pearson*, for the plaintiffs, contended that the plaintiffs, having become entitled to both mortgages, had the right of tacking them to one another.

They referred to *Watts v. Symes*, (a) *Smeathman v. Bray*, (b) *Titley v. Davies*, (c) *Bovey v. Skipwith*, (d) *Tribourg v. Lord Pomfret*. (e)

& P. (8th Am. ed.) 196, 197; 2 Dart V. & P. (4th Eng. ed.) 896, 897; 1 Lead. Cas. in Eq. (3d Am. ed.) 594, and notes to *Marsh v. Lee*.

(a) 1 De G., M. & G. 240. (b) 15 Jur. 1051.

(c) Vin. Abr. Mortgage (F.), 19, 20; S. C. 2 Eq. Ca. Abr. 604; and see 2 Y. & C. C. C. 399, where the facts are stated.

(d) 1 Ch. Ca. 201. (e) Cited in *Ex parte Carter*, Amb. 733.

*Mr. Lee* and *Mr. W. H. Terrell*, for the defendants.— When the defendant Lee and his co-mortgagees advanced their money, the prior mortgages were in different hands, and they might have redeemed either of them without the other. The plaintiffs took with notice of this right, and could not, under such circumstances, prejudice it by uniting the prior mortgages.

They referred to *Titley v. Davies*, (a) *Mackreth v. Symons*, (b) *Willoughby v. Willoughby*, (c) *Bowker v. Bull*, (d) *Otter v. Vaux*, (e) *Pope v. Onslow*, (g) *Ireson v. Denn*, (h) *Sinclair v. Jackson*, (i) *Jarman's Bythewood*, vol. v. p. 436 (3d ed.).

*Mr. Malins*, in reply, was stopped by the Court.

\* THE LORD JUSTICE KNIGHT BRUCE.— A long course \* 613 and series of authorities binding on the Court preclude the possibility of our thinking that there is in this case more than one arguable question, if any,— the question, namely, on which *Mr. Lee* has addressed the Court, as to the materiality of notice of a second mortgage to a transferee of prior mortgages ; but I am not aware of any authority for holding such a notice to be material. . *Mr. Lee* has referred to *Titley v. Davies*, in which Lord HARDWICKE alludes to notice for a different purpose ; *Mr. Lee*, however, has furnished us with no other authority upon the point. I apprehend that, according to the decisions, it is immaterial whether, when a transferee of two mortgages on different estates buys or acquires those mortgages, he has or has not notice of any subsequent mortgage. The second incumbrancer in this case must be deemed to have taken his security with knowledge, that the two mortgages on the two estates, though then belonging to different mortgagees, might coalesce, and with knowledge of the possible consequences of their coalition. There may be moral considerations of weight against this conclusion, but it is, I conceive, settled by authority.

THE LORD JUSTICE TURNER.— It is impossible to distinguish

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| (a) <i>Ante</i> , p. 480, n. (c). | (e) 2 K. & J. 650. |
| (b) 15 Ves. 328.                  | (g) 2 Vern. 286.   |
| (c) 1 T. R. 763.                  | (h) 2 Cox, 425.    |
| (d) 1 Sim. N. S. 29.              | (i) 16 Beav. 405.  |

this case from *Bovey v. Skipwith*, (a) on any other ground than that as to notice being material. If, however, notice were material, a transferee in such a case as this would be bound to allege and prove the want of notice. We find no trace of any such allegation, or of such proof being required. The absence, in the authorities, of statements of any such circumstances, go far to show that they must have been considered immaterial.

Appeal dismissed with costs.

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1858. May 22, 24. June 12. Before the LORDS JUSTICES.

The 504th and 514th sections of the Merchant Shipping Act, 1854, limiting the damages to be recovered in case of collision by reference to the value of the vessel doing the injury and her freight, do not apply to a collision on the high seas between foreign ships, of which the owners are foreigners. General words in an Act do not always extend to every case which falls literally within them.

THIS was an appeal from the decision of the Vice-Chancellor Wood, allowing a general demurrer. The case below is reported in the fourth volume of Messrs. Kay and Johnson's Reports. (b)  
The bill contained statements to the following effect : —

1. On the 28th day of April, 1857, a collision took place between the American ship "Tuscarora," of which the plaintiffs were owners, and an American ship called "Andrew Foster." Shortly after the collision, the "Andrew Foster" foundered and was lost with her cargo.
2. In respect of the loss of the said ship, the plaintiffs are answerable in damages to the extent and in manner mentioned in part ix. of "the Merchant Shipping Act, 1854" (that is to say), to the extent of the value of the "Tuscarora" and the freight due or to grow due in respect of her then voyage.

(a) 1 Ch. Ca. 201.

(b) Page 367.

Such value, however, is insufficient to answer all the claims made, or which may be made, against the plaintiffs in respect of the loss of the said ship "Andrew Foster." 3. On the 9th of May, 1857, an action was commenced against the "Tuscarora" and her freight in the Court of Admiralty by some of the defendants or consignees of cargo laden on board the "Andrew Foster;" and by the decree, which was affirmed by the Privy Council on appeal, the plaintiffs were condemned in the damages consequent on the collision and in costs. Other judgments had been similarly obtained by others of the defendants, and the "Tuscarora" had been arrested by process of the Admiralty Court, and was still under arrest and liable to be sold.

\* The bill prayed that the value of the ship "Tuscarora," \* 615 and the freight due and to grow due in respect of her voyage, at the time of the collision, might be ascertained, the plaintiffs being willing to pay into Court such sum as, upon the result of such inquiry, was properly payable by them; that the sum so paid into Court might be distributed ratably among the several claimants in respect of the loss of the "Andrew Foster;" that the claims of all parties who should not come in and establish their claims within such reasonable time as aforesaid might be excluded, and that the defendants might be restrained from further proceedings in the Admiralty Court, or, if not wholly restrained as aforesaid, then that they might be restrained as aforesaid, except so far as, in the opinion of the Court, they ought not to be so restrained.

The *Solicitor-General*, *Mr. Amphlett*, and *Mr. Charles Hall*, in support of the appeal.—The provisions of part ix. of the Act are applicable to the case, for they are not limited to the ships of any nation, and do not contravene any general law of nations, the general maritime law not being in all cases, as is contended on the other side, one of unlimited liability. The case falls literally within the 504th and 514th sections, (a) which extend

(a) "DIV. No owner of any sea-going ship or share therein shall, in cases where all or any of the following events occur without his actual fault or privity (that is to say),—

(1.) Where any loss of life or personal injury is caused to any person being carried in such ship:

- \* 616 expressly to all "sea-going" \* ships. Unless, therefore, some controlling context can be found in the Act, clearly showing that its words are not to be interpreted according to their ordinary meaning, the demurrer cannot succeed. Now the interpretation clause defines the word "ship" as including every description of vessel used in navigation, not propelled by oars. And the context of the Act, so far from opposing the natural and defined meaning of the words, comes in aid of it, for there
- \* 617 are many provisions \* in the Act which must necessarily extend to foreign ships, and show, therefore, that the word "ship" is not restricted to British vessels. Thus the provisions

- (2.) Where any damage or loss is caused to any goods, merchandise, or other things whatsoever on board any such ship:
- (3.) Where any loss of life or personal injury is, by reason of the improper navigation of such sea-going ship as aforesaid, caused to any person carried in any other ship or boat:
- (4.) Where any loss or damage is, by reason of any such improper navigation of such sea-going ship as aforesaid, caused to any other ship or boat, or to any goods, merchandise, or other things whatsoever on board any other ship or boat:

be answerable in damages to an extent beyond the value of his ship, and the freight due or to grow due in respect of such ship during the voyage, which, at the time of the happening of any such events as aforesaid, is in prosecution or contracted for, subject to the following proviso (that is to say), that in no case where any such liability as aforesaid is incurred in respect of the loss of life or personal injury to any passenger shall the value of any such ship and the freight thereof be taken to be less than 15*l.* per registered ton."

"DXIV. In cases where any liability has been or is alleged to have been incurred by any owner in respect of loss of life, personal injury, or loss of or damage to ships' boats or goods, and several claims are made or apprehended in respect of such liability, then, subject to the right hereinbefore given to the board of trade of recovering damages in the United Kingdom in respect of loss of life or personal injury, it shall be lawful in England or Ireland for the High Court of Chancery, and in Scotland for the Court of Session, and in any British possession for any competent Court, to entertain proceedings at the suit of any owner, for the purpose of determining the amount of such liability, subject as aforesaid, and for the distribution of such amount ratably amongst the several claimants, with power for any such Court to stop all actions and suits pending in any other Court in relation to the same subject-matter; and any proceeding entertained by such Court of Chancery or Court of Session or other competent Court, may be conducted in such manner and subject to such regulations as to making any persons interested parties to the same, and as to the exclusion of any claimants who do not come in within a certain time, and as to requiring security from the owner, and as to payment of costs, as the Court thinks just."

in the fourth part of the Act, as to signals, and ships meeting and passing, must apply to ships of all nations. So the provisions in the fifth part, as to compulsory pilotage, and of the eighth part, as to wrecks and salvage, must be construed as extending to foreign ships. In all these and many other clauses, the word "ship" must necessarily include a foreign ship. Why is it in the section as to collision to receive a different construction? When any of the clauses are restricted to British ships, the restriction is expressed. Thus, in the 5th section, specifying the different heads into which the Act is divided, the third part is described as relating to British ships, their ownership, measurement, and registry; but the ninth part is described as relating to "liability of ship-owners," without the addition of the word "British." So in the commencement of the fourth part, it is enacted, that this part shall apply to all British ships, and all foreign steam-ships carrying passengers between places in the United Kingdom. If the ninth part had been intended only to apply to British ships, the saving clause at the end of it, excluding from its operation "any British ship not being a recognized British ship within the meaning of the Act," would not have been so framed. It was contended, in support of the demurrer, that it would be an interference with the rights of foreign countries for the British legislature to provide laws for foreign vessels, but it is a well-recognized principle of international law, that the country whose tribunal is resorted to has authority to determine the extent of relief which it will afford for an injury. The quantum of damages is essentially a matter to be determined by the law fort, and a restriction on the amount of damages to be recovered is no more an infringement of the law of nations, than the limitation of time for recovering arrears of interest. *Don v. Lippman, (a) The Vernon.* (b) Another argument in support of the demurrer was, that the reference to registered tonnage showed that British ships were alone meant, but this is a fallacious argument, and would prove too much, for it would withdraw from the operation of the Act vessels which are, beyond dispute, intended to be within it; for instance, Newfoundland vessels, which are by the 19th section exempt from the registration, if of not more than thirty tons burden. The reference to the registry only applies to such vessels as

are registered, and as to which, therefore, there is this easy mode of determining their tonnage. In other cases, the tonnage must be differently ascertained. The term "registered ton" is a technical expression to denote a particular measurement, and not one excluding vessels whose tonnage is not actually registered.

They also referred to *Le Roux v. Brown*, (a) *The Zollverein*, (b) *British Linen Company v. Drummond*, (c) *De la Vega v. Vianna*, (d) *Lopez v. Burslem*. (e)

*Mr. James* and *Mr. Giffard*, in support of the demurrer.—We dispute the proposition that the general law maritime is not one of unlimited liability. In the case of *The Dundee*, (g) the contrary was laid down by Lord STOWELL. The very Act of Parliament now under construction, as well as the preceding Acts, are framed

upon the supposition, that the general law is one of unlimited liability, and the limitation of liability provided \* by this

Act is not universal in any view of the case. It is expressly restricted to sea-going ships. River ships would therefore remain liable to pay damages to the full extent of the injury. The 504th section itself provides for cases in which the amount of liability may exceed the value of the ship and freight. For according to that section a collision, to be protected by it, must take place without the actual fault or privity of the owners. If, therefore, the collision was owing to the ship not being sufficiently found with anchors or other fittings, the liability would be unlimited. So, also, if a British ship is unregistered, the 504th section would not apply, and the liability would then be unlimited. The provision is therefore an exceptional one, and not such as any one nation has authority to impose upon another. It is a qualification and restriction of the general law of nations, and not a mere law of procedure, so as to be within the province of the *lex fori*, as was the case in *Don v. Lippman*, (h) or *Le Roux v. Brown*. (a) Moreover, Acts of Parliament are not to be construed as applying to foreigners, unless they are clearly so expressed. *Jefferys v.*

(a) 12 Com. B. 801.

(e) 4 Moore, P. C. 300.

(b) 2 Jur. N. S. 429.

(g) 1 Hagg. 109.

(c) 10 B. & C. 908.

(h) 5 Cl. & Fin. 1.

(d) 1 B. & Ad. 284.

*Boosey.* (a) The provisions in the Act as to pilotage are expressly restricted to the United Kingdom, and are consequently clearly within the province of municipal law. There is, therefore, no contravention of the law of nations in applying them to foreigners as well as to our own subjects. The fact is, that the general scope of the Act contemplates British ships only, but that in particular cases, such as that of salvage, rules, which are part of general law of and are applicable to all countries, are made to extend to ships of other nations. When a foreign ship is intended to be included, as in section 527, it is mentioned, and section 291, which has been relied upon \* behalf of the plaintiffs, is at least \* 620 equally consistent with the defendants' interpretation, and the reference to the register of the determination of the tonnage, and the assessment of damages with reference to it, shows that the ninth part must be taken to apply only to British ships. Again, section 503 cannot apply to foreigners, for it is simply a municipal law, and if the words "sea-going ships" must in section 503 be read as meaning a British ship, why are they to receive a wider construction in the 504th section? The ninth part of the Act has nothing to do with the ship itself; it only affects the personal liability of the owner.

*The Solicitor-General, in reply.*

Judgment reserved.

June 12.

THE LORD JUSTICE KNIGHT BRUCE.—The two first paragraphs of the bill in this cause are thus worded: [His Lordship read them to the effect above set out.]

There is no statement in the bill of the place where, or any place near which, the alleged collision happened, but it was agreed between the counsel that it should be deemed to have happened at sea in the Irish Channel, between Tuskar and Bardsey, and they also agreed that both vessels should be taken as having belonged, and the "Tuscarora" as still belonging, wholly to citizens of the United States of America, and both ships as

(a) 4 H. L. Cas. 815.

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being, with regard to Great Britain, in every sense as foreign vessels.

The question is, whether the 504th and 514th sections of \* 621 the Merchant Shipping Act, 1854 (17 & 18 Vict. \* c. 104), or either of them, ought to be construed as applying to such a case. At least the plaintiffs, the appellants, have not nor could reasonably have contended that their bill has any foundation, unless those two sections, or one of them, ought to be so interpreted.

And I am of opinion, considering the state of the law of this country immediately before the passing of the Act, and considering the context, that we ought not so to construe the 504th and the 514th sections, or either of them. In other words, the language of the statute does not appear to me to show, that any provision was intended to be made, by either of the two sections, for the case of damage done at sea by a vessel in every sense foreign, to another vessel in every sense foreign, or to her cargo. I assume that the plaintiffs would have been right if both the "Tuscarora" and the "Andrew Foster" had been British in ownership and character (all things else being the same), nor do I say whether the plaintiffs would have been right or wrong, if one only of the two ships had been of that description, or if the collision had happened in a British river or a British port; but as the facts are, the plaintiffs seem to me, I repeat, to have no case here.

Stress was laid by their learned counsel on the word "British" in the 516th section, where it is first used there, a circumstance which, however, in my opinion, does not assist them. I consider it to be clear that, independently of that word, the plaintiffs are not within the Act, and we should, I conceive, be giving an undue and improper effect to it were we to hold that it changes the construction of the statute for the purpose in contention. Nor, in saying this, do I forget the language of the 18th, 19th, 106th, 109th, and 291st sections, the preamble, the interpretation \* 622 clause, the expressions of \* the 5th section, the 527th, 528th, and 529th sections, and the Statute 17th & 18th Vict. c. 120 (The Merchant Shipping Repeal Act, 1854).

The Vice-Chancellor having allowed the demurrer, that decision ought not, in my judgment, to be disturbed.

THE LORD JUSTICE TURNER.—After having given this case very

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attentive consideration, I have come to the same conclusion as my learned brother and the Vice-Chancellor have arrived at, and am of opinion that this demurrer was properly allowed.

The bill is filed by American owners of an American ship, against the owners of another American ship, also Americans, and the owners of the cargo on board the latter ship, stating a collision between the two ships, by which the latter of them was sunk, and praying to have the value of the plaintiffs' ship, and of the freight for her voyage, ascertained and apportioned between the parties interested in the ship and cargo lost by the collision, and to restrain proceedings against the plaintiffs in respect of the damages incurred by the defendants. The plaintiffs can only be entitled to this relief if they can bring the case within the Merchant Shipping Act, 1854, and the question, therefore, is, whether that Act extends to the case of a collision between foreign ships, of which the owners are foreigners.

This Act is divided into several parts, each of which relates to a distinct and independent branch of merchant shipping law. The Act indeed may well be considered as embodying several distinct Acts in one Act; and one part of the Act, therefore, throws no \* further light upon the other parts of it than \* 623 would be cast upon them by the existence of other separate and distinct enactments to the same effect. It is upon the ninth part of this Act (with the light thus thrown upon it by the other parts of the Act, and with the aid of course of the interpretation clause, which applies to the whole Act) the question before us depends.

This ninth part of the Act relates to the liability of the ship-owners. It first provides that this part of the Act shall apply to the whole of her Majesty's dominions, which I take to mean no more than that it is to be in force throughout those dominions. It then lays down the rules which are to govern the liability of ship-owners. It next points out the course of procedure, and winds up with a limiting provision, specifying some cases to which this part of the Act is not to apply or extend.

In construing this part of the Act we ought, I think, in the first place, to consider to what cases the rules which are laid down were meant to extend; and then, what is the effect of the limiting provision; for no fair judgment can be formed as to the effect of that provision until it is known to what the limit was intended to

be applied. To what cases, then, were these rules intended to extend? They are contained in the 503d and 504th sections of the Act, which are as follows: [His Lordship read them.]

The words of these sections are no doubt wide and extensive.

The words "any sea-going ship," construed with reference to the interpretation clause, would embrace every vessel navigating the sea, which is not propelled by oars, but it is not because general words are used in an Act of Parliament every case which falls within the words is to be governed by the Act. It is

\* 624 \* the duty of the Courts of justice so to construe the words as to carry into effect the meaning and intention of the legislature. We had occasion very much to consider this point in *Hawkins v. Gathercole*, (a) in which case we restrained the effect of general words in the Act on which the case depended; and there are many cases in the books to the same effect, some of which are referred to in that case, and others not, but are to be found in Viner's Abridgment, title "Statutes." Was it then the intention of the legislature that the general words contained in the sections to which I have referred should extend to the case of a collision between foreign ships owned by foreigners? I think it was not. This is a British Act of Parliament, and it is not, I think, to be presumed that the British Parliament could intend to legislate as to the rights and liabilities of foreigners. In order to warrant such a conclusion, I think that either the words of the Act ought to be express or the context of it to be very clear.

The circumstance of foreign vessels being affected by some other parts of the Act was relied on upon the part of the appellants in support of their argument that they were intended to be included in this part of the Act, but the parts of the Act which affect foreign vessels apply to different subjects and may well rest on different considerations; and this part of the appellants' argument is not, therefore, I think, entitled to any weight. Another consideration, which as it seems to me bears strongly upon the general words of these sections of the Act, is, I think, furnished by considering the source from which these sections are derived. They are plainly taken from 53 Geo. 3, c. 159, and the prior Acts on which that statute was founded, and those Acts had before the passing

\* 625 of this Act been decided not to apply to foreign rights.

(a) 6 De G., M. & G. 1.

The legislature cannot be supposed to have been ignorant of that decision at the time this Act was passed, and it cannot, I think, be imputed to it that with that knowledge it intended to alter the law on this important question, without some more definite expression of that intention. But what seems to me to be more decisive upon the subject, is the context of the Act. If the 504th section reaches the case of a collision between foreign vessels owned by foreigners, the 503d section must also reach that case, and then we must suppose that the British Parliament meant by this Act to legislate upon the questions what should be inserted in the bills of lading of foreign shippers, and what should be declared by them to the masters of the vessels on board which their goods were shipped. There is besides this the provision as to the registered tons, which of course must mean registered tons according to the measurement prescribed by the Act, the Act having no reference to the measurement of foreign ships, and there is also the provision as to the account between the part-owners, which cannot surely have been intended to have effect in foreign Courts. I am satisfied, therefore, that upon the true construction of the clauses to which I have referred, they were not intended to apply to foreign ships owned by foreigners.

Then does the limiting provision which is contained in the 516th section alter this construction. The section is as follows : [His Lordship read it.]

I am of opinion that the construction which I have put upon the previous parts of the Act is not altered by this section, for foreign ships owned by foreigners being excluded, and it being clear that there can be no foreign owner of a British ship, the words "no owner" in the 504th section can only mean and must be read "no \* British owner ;" and as to the words "any sea- \* 626 going ship," they must of course either mean, and must accordingly be read, either "any British sea-going ship," or "any British and foreign sea-going ship," according as the Act is limited in its operation to British ships or extended to British and foreign ships, a point which I leave wholly untouched, but in either case the proviso fits aptly to the enactment without involving any such consequences as the appellants have contended for.

An attempt was made on the part of the appellants to bring this case within *Don v. Lippman* and cases of that class, but I think

those cases have no bearing upon the point. This is a question of liability, and not of procedure.

Upon the whole, my opinion is, this appeal must be dismissed, and with costs.

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### AUSTEN v. BOYS.

1858. May 31. June 2, 12, 23. Before the Lord Chancellor LORD CHELMSFORD.

Although articles of partnership may be presumed from the dealings of the partners to have been waived, a single instance of departure from them is not a sufficient foundation for such a presumption.

Good-will in general means the chance of being able to keep a business connected with the place where it has been carried on,<sup>1</sup> but it is in this sense inapplicable to the business of solicitors.<sup>2</sup>

Where articles of partnership between London solicitors provided that either partner might retire, and that in that case the continuing partner should pay the retiring partner for his share and good-will the fair marketable value, and the retiring partner should not practise within one hundred miles of the General Post Office, but should use his best endeavours to promote the interests of the remaining partners: *Held*, that good-will must be taken to mean only the interest which the retiring partner would have had if he had remained in the partnership till the expiration of it by effluxion of time.<sup>3</sup>

THIS was an appeal from the decision of the Master of the Rolls, reported in the 24th volume of Mr. Beavan's Reports. (a)

\* 627 \* The material facts and documents will be found sufficiently stated in that report and the Lord Chancellor's judgment.

*The Solicitor-General, Mr. Bovill, and Mr. Burdon, for the plaintiffs.*

(a) Page 598.

<sup>1</sup> See 2 Lindley Partn. (Eng. ed. 1860) 709-711; Collyer Partn. (5th Am. ed.) §§ 161-164, and notes.

<sup>2</sup> See Collyer Partn. (5th Am. ed.) § 163; 2 Story Eq. Jur. § 951 d; Parsons Partn. 264.

<sup>3</sup> See 2 Lindley Partn. (Eng. ed. 1860) 711.

*Mr. Lloyd, Mr. Selwyn, and Mr. Hislop Clarke*, for the defendant Mr. Boys.

*Mr. Rolt, Mr. Follett, and Mr. Rasch*, for the defendant Mr. Tweedie.

The following cases were referred to : *Colyear v. The Countess of Mulgrave*, (a) *Booth v. Parks*, (b) *Whittaker v. Howe*, (c) *Bozon v. Farlow*, (d) *Essex v. Essex*, (e) *Colman v. Sarrel*, (g) *Candler v. Candler*, (h) *Geddes v. Wallace*, (i) *Bunn v. Guy*, (k) *Hitchcock v. Coker*, (l) *Elves v. Crofts*, (m) *Cooper v. Watlington*, (n) *Kemble v. Kean*, (o) *Lumley v. Wagner*, (p) *Const v. Harris*, (q) *Peacock v. Peacock*, (r) *Darby v. Whitaker*. (s)

THE LORD CHANCELLOR.—In this case a bill has been filed against the defendants, who had been in partnership with the plaintiff as attorneys and solicitors, praying to have the usual accounts of the partnership taken upon its dissolution ; \* that the value of the plaintiff's share in the business \* 628 and good-will thereof may be ascertained and declared pursuant to the provisions of the tenth and eleventh paragraphs of certain articles of agreement of the 24th of July, 1846, reckoning the same as a continuing business and not as terminating on the 1st of September, 1853 ; that defendants may be decreed to pay to plaintiff whatever sum shall be found due on taking such accounts, together with interest thereon from the 1st of September, 1853, and that all proper directions may be given for winding up the concerus of the copartnership.

The partnership in question had been preceded by other partnerships, under which, first, Mr. Hale, now deceased, and afterwards Mr. Boys the defendant and Mr. Austen the plaintiff, were successively introduced into the business by Mr. John Hopton Forbes,

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| (a) 2 Keen, 81.    | (l) 6 A. & E. 498.        |
| (b) 1 Moll. 465.   | (m) 10 C. B. 241.         |
| (c) 3 Beav. 383.   | (n) 2 Chit. 451.          |
| (d) 1 Mer. 459.    | (o) 6 Sim. 388.           |
| (e) 20 Beav. 442.  | (p) 1 De G., M. & G. 604. |
| (g) 1 Ves. Jr. 50. | (q) T. & R. 496.          |
| (h) Jac. 225.      | (r) 16 Ves. 49.           |
| (i) 2 Bligh, 270.  | (s) 4 Drew. 134. .        |
| (k) 4 East, 190.   |                           |

who may be regarded as the founder of the connection between the parties.

At the time when Mr. Austen the plaintiff became a partner, the firm consisted of Messrs. Forbes, Hale, and Boys, and by articles of agreement between them and himself, of the date of the 15th of August, 1838, reciting that Mr. Forbes proposed to retire from the business, and to withdraw his name from the same on the 1st of September, 1839, and to introduce his relation Mr. Austen as a partner with Messrs. Hale and Boys from that day, it was agreed that the name of Mr. Austen should be introduced into the firm from the 1st of September, 1838, but that he should not be considered as a partner until the 1st of September, 1839, and from that day Messrs. Hale, Boys and Austen agreed to become partners

for the term of seven years. This agreement contains a \* 629 clause that has an important \* bearing on the question between the parties. It is the 8th clause, and is in these words :

" That the said Matthew Hale, Daniel Boys, and Frederick Lewes Austen hereby severally agree with the said John Hopton Forbes at any future time to article Alexander Forbes Tweedie, if requested, before he attains twenty-one, and to admit him when out of his articles, if competent and well conducted, to such a share of the business as shall be agreed upon between his guardians and the then continuing partners, and, in case of difference, to such a share as shall be settled by arbitration to be fair."

This clause bound all the parties during the subsistence of that partnership to admit Mr. Tweedie to a share of the business, subject, of course, to the various stipulations contained in the partnership agreement. The power reserved to Mr. Forbes to introduce Mr. Tweedie to a share in this partnership was not exercised during its continuance down to the 1st of September, 1846; but on the 24th of July, 1846, fresh articles of partnership were entered into by all the then parties for a further term of seven years from the first of September then next. This agreement contained the two clauses referred to in the prayer of the bill as the 10th and 11th paragraphs, and which are as follows :—

" 10. In case of the death of any partner, the partnership to go on till the 1st of September then next following, and the partnership to be then determined as to that partner, and the partnership property, such as the house, books, furniture, &c., to be

valued, and the surviving partners or partner to pay off to the representatives of the deceased partner his share of such valuation on such 1st day of September, or else pay interest thereon till paid at the rate of six per cent. \* The surviving partners are also to pay to such representatives, on such 1st day of September, a sum equal to half of what a retiring partner would be entitled to as the value of his share of the business on such 1st day of September, with interest till paid at five per cent, upon the same principle as is laid down in the 11th article of this agreement. The surviving partners must also open fresh accounts from such 1st day of September succeeding the date of the death, and wind up the partnership business and accounts, and pay over to the representatives of such deceased partner his share of the outstanding profits and assets, as quickly as possible without injuring the business or interests of the surviving partners or partner ; and all deeds and papers, &c., to belong to the surviving partners or partner ; and the style of the firm to remain the same as at present, if desired, notwithstanding the death of any partners or partner.

" 11. Power for any partner or partners to retire, and in that case the surviving partners or partner to pay such retiring partner or partners for his or their interest and share and good-will in the business the fair marketable value thereof, by equal annual instalments, with interest at five per cent from the time of such retirement till paid, but such retiring partner or partners not to practise, either directly or indirectly, within 100 miles of the General Post Office, and use his best endeavours to promote the interests of the remaining partners."

And the 13th article was, " This agreement to be subject to the 8th article of the existing partnership agreement with reference to Mr. Alexander Forbes Tweedie." It was insisted on the part of Mr. Boys, that the effect of that clause was to bring every stipulation of the articles into subordination to the eighth article of \* the agreement of the 15th August, 1838. On the part of the plaintiff, it was contended that it merely provided for the introduction of Mr. Tweedie to the partnership, subject to all the provisions contained in the articles which might not be found inapplicable to the new state of things, consequent upon his becoming a partner. All that it is necessary for me to observe in passing upon these different views is, that the partnership of 1846

was subject to the provision contained in this eighth article, precisely in the same manner as the agreement of the 15th of August, 1838, was, and that if nothing more had taken place than the admission of Mr. Tweedie to the partnership in the terms of this article, merely by agreeing to the share of the business he was to have, or having it settled by arbitration, and the question had been confined to the agreement of the 24th of July, 1846, without the effect of the memorandum of September, 1849, having to be considered, whatever difficulties might have arisen in adjusting the rights of the parties, under the tenth and eleventh clauses, they would have been bound by the contract into which they deliberately entered. This observation may be found to have some effect upon the argument arising out of the state of things produced by the memorandum of September, 1849.

The partnership having been thus formed, it continued to be carried on till the death of Mr. Hale on the 21st of September, 1848, and upon that event happening, it is alleged by the bill, that the value of his one-third share was calculated pursuant to the eleventh article, at half a retiring partner's share in perpetuity, and at two years' purchase, and that the plaintiff and the defendant Daniel Boys paid to or secured to Mr. Hopton Forbes and Mrs. Catherine Hale, as the executors of Matthew Hale, the sum of 3000*l.* in respect of his share of the business.

\* 632 \* It was argued on the part of the plaintiff, that by this adjustment of the value of Mr. Hale's share, the parties had agreed upon a construction of the articles in question, by which the Court would be bound; and *Geddes v. Wallace* (a) was cited to show, that whatever may be the language of a partnership deed, the dealings and transactions among the partners may be such as to amount to distinct evidence that some of the articles in that partnership deed were waived by all parties, and that some of the articles in the deed were not to be considered as rules which should regulate the rights and duties of those partners. But the Court has no evidence before it of the principle on which the adjustment of the value of Mr. Hale's share took place, and even if it had been proved that it had been calculated in the manner alleged by the plaintiff, a single instance would hardly justify a construction contrary to the obvious meaning of an agreement, much less a con-

(a) 2 Bligh, 270.

clusion that the parties had waived its terms and had agreed to substitute for it a different one.

In September, 1849, Mr. Forbes was desirous of exercising the rights reserved to him by the eighth clause of the agreement of 15th August, 1838, incorporated as it was in the agreement of the 24th of July, 1846, and accordingly the following memorandum of terms proposed expressly with reference to the articles of agreement of the 15th of August, 1848, was prepared.

“September, 1849. Memorandum of terms proposed as regards Mr. Alexander Forbes Tweedie, with reference to the articles between Mr. John Hopton Forbes, Mr. Matthew Hale, Mr. Daniel Boys, and Mr. F. L. Austen, in relation to Mr. Alexander Forbes Tweedie. \* Mr. Alexander Forbes Tweedie to be allowed, in the nature of salary, at the rate of 500*l.* per annum until the 1st September, 1850. On that day his name to be introduced into the firm after Mr. Frederick Lewis Austen's. From 1st September, 1850, Mr. Alexander Forbes Tweedie to take one-fifth of profit and loss of the business until 1st September, 1853, from which date he is to share equally with the other partners. In case of the death or retirement before 1st September, 1853, of either of the senior partners, his two-fifths to be divided into thirds, of which the surviving senior partner is to take two-thirds and Mr. Alexander Forbes Tweedie one-third. On the 1st September, 1850, it will be necessary to open a new account, and new books, and Mr. Alexander Forbes Tweedie must bring in his proportion of capital to the new firm. That the partnership shall continue for ten years from 1st September, 1850. That from 1st September, 1849, and during the partnership, Mr. Alexander Forbes Tweedie to submit to the direction and judgment of Mr. Daniel Boys, as to the particular department of business he is to attend to, and in all matters of the conduct of business or otherwise relating to the partnership concerns.”

This memorandum was signed by Mr. Boys and Mr. Tweedie, it being admitted that Mr. Tweedie, at the time of signing, had no knowledge of the articles 10 and 11 in the agreement of 1846, and although Mr. Forbes knew of them, yet it appears that they were not present to his mind at the time of the arrangement. All this, however, is immaterial, as it is conceded that these articles

are not binding upon Mr. Tweedie. The plaintiff would not sign the memorandum *simpliciter*, but in connection with his signature he wrote: "N. B.—The above memorandum fixing the share and position of Mr. Tweedie in the business is not to annul \* 634 \* or prejudice the existing articles of partnership between us of the 24th July, 1846, the stipulations of which are still to remain in force between us, except so far as the above memorandum affects Mr. Tweedie's interests."

Pausing here, the question arises, what were the rights of the parties under the circumstances thus detailed. The counsel for Mr. Boys insist, that every stipulation and clause of the agreement of 1846 is subject to the control of the 8th article of the agreement of 1838; that the agreement of 1849 and that of 1846 cannot stand together, and that therefore the one is completely superseded by the other. On the part of Mr. Austen it is argued, that the agreement of 1846 could only be got rid of by an express subsequent agreement, and that, so far from consenting to terminate the agreement of 1846, he signed the memorandum of 1849, with an express reservation of his rights under it. And the conclusion at which I have arrived, after a careful consideration of the whole case, is in favour of this view of the plaintiff. When the parties made the 8th article a provision of the agreement of 1846, they did it with reference to the stipulations contained in it, and they might at once have brought Mr. Tweedie into the partnership formed by that agreement by arranging the share he was to have without any thing more. The memorandum of 1849, though placing Mr. Tweedie on a different footing from that on which he would have been under the agreement of 1846, has a reference to that agreement and even to the 10th and 11th articles of it, which, though unknown to Mr. Tweedie, must have been perfectly well understood by Mr. Boys, for it makes provision for the events of death or retirement, to which those articles refer, and confines it within the period of 1st September, 1853, beyond which these articles had no operation. This obviates,

\* 635 \* in a great measure, the objection which has been urged on the part of Mr. Boys, that he would have to purchase the whole of Mr. Austen's share, and would only have the benefit of a portion, as Mr. Tweedie would be entitled to one-third of it, because the answer would be, "you had the agreement in your

mind, and you chose to consent to terms which imposed these consequences upon you."

If the understanding of the parties could be made available to the construction of the agreement, Mr. Boys in his answer distinctly states the existence of the agreement of 1846 after the memorandum of 1849.

I entertain no doubt that, as between the plaintiff and Mr. Boys, the articles 10 and 11 are operative, notwithstanding the memorandum of September, 1849. It therefore becomes necessary to ascertain the meaning and effect of these articles. Mr. Austen having continued to be a partner down to the 29th of August, 1853, when he gave notice of dissolving the partnership, now claims the fair marketable value of his interest and share and good-will in the business, contending that the term "good-will" is not confined to the limits of the partnership of 1846, but is a value attaching to the business and incident to it, without reference to any term which may be created between the parties engaged in it.

It is very difficult to give any intelligible meaning to the term "good-will" as applied to the professional practice of a solicitor in this abstract sense. Where a trade is established in a particular place, the good-will of that trade means nothing more than the sum of money which any person would be willing to give for the chance of being able to keep the trade connected

\* with the place where it has been carried on. It was truly \* 636 said in argument that "good-will" is something distinct from the profits of a business, although in determining its value the profits are necessarily taken into account; and it is usually estimated at so many years' purchase upon the amount of these profits. But the term "good-will" seems wholly inapplicable to the business of a solicitor, which has no local existence, but is entirely personal, depending upon the trust and confidence which persons may repose in his integrity and ability to conduct their legal affairs. I can perfectly understand a solicitor agreeing to relinquish his business in favour of another, and to use his best endeavours to recommend his clients, and engaging not to interfere with his successor, by a stipulation not to carry on business within a certain distance, but to sell the good-will without any thing more, and without arranging any price, would be an agreement incapable of being enforced by specific performance.

But this term, as used in the agreement of 1846, appears to me

to be capable of a definite meaning, and if confined, within the limits of the agreement, and as between the parties themselves, it becomes perfectly intelligible. It seems to have been intended to describe that interest which the retiring partner would have had if he had remained in the partnership, and which by his retirement before its termination he was willing to relinquish to the continuing partner. The notice of retirement might have been given when the partnership had still several years to run, and then the estimate of the share of the retiring partner would have been made upon a calculation of the value of it for the remaining years, taking into account all the contingencies which must necessarily attach to any business, however long established or well conducted.

\* 637     \* Mr. Austen chose to wait till the partnership was within a day of its expiration. If he had given no notice, and the agreement of 1846 had been allowed to expire by affluxion of time, I do not understand it to be contended, that there would have been any claim to good-will, and yet, according to the definition of the term which was pressed upon me in the argument, the business with its ideal value would still remain. It is impossible for Mr. Austen to extend the application of the tenth and eleventh articles to the partnership which was to continue after 1853 until 1860, as the note which he signed at the foot of the memorandum of 1849 is not, that those articles are to apply to the memorandum of 1849, but that the memorandum of 1849 is not to prejudice or annul the articles of 1846.

But it is said, that the stipulation as to not practising within two miles of the post-office, being indefinite, and, therefore, extending to the whole period of the life of the retiring partner, is inconsistent with the notion of the term "good-will" having such a narrow and contracted meaning as would be thus assigned to it. But this argument is founded upon an entire disregard of the different offices of the two stipulations. The one is intended to provide for the sale of the interest in the partnership, whenever either partner wishes to retire. The other is a general engagement, the consideration of which is not merely the benefit obtained on retirement, but the whole of the partnership agreement. No question arises in these cases on the adequacy of the consideration, unless it is merely illusory, but solely whether the restraint is confined within reasonable limits of space or time.

Mr. Austen might have secured a real value for his interest in the partnership by giving an earlier notice of \* retirement, and his not having done so, but having refrained until his interest had become merely nominal, cannot be a reason for varying the construction of the agreement. I am satisfied, that the term "good-will," associated, as it is, with the words "share and interest," and being a matter of valuation between the partners themselves, must be confined within the limits of the partnership, and that Mr. Austen is not entitled to any supposed value of his share beyond it.

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**In the Matter of The LONDON AND COUNTY ASSURANCE COMPANY.**

**JESSOPP'S CASE.**

1858. June 2, 26. Before the LORDS JUSTICES.

J. was a director and shareholder in a company which had become embarrassed, and he was desirous of having it wound up. The majority of the directors, however, negatived a motion for having it wound up, and entered into an arrangement with S. for the purpose of bringing its affairs into a more prosperous state. By this arrangement S. was to have a number of shares transferred to him or his nominees, and was to have powers and privileges which it was a breach of duty to give him. J. did not, in his capacity of director, concur in or assent to this arrangement, but he transferred all his shares to a nominee of S., and agreed with S. to pay a certain sum in addition upon being released from all liability in respect of a certain demand against the company. The consent of the directors to transfers was not requisite. The Court was satisfied, on the evidence, that J. made the transfer not to facilitate the arrangements between the other directors and S., but to escape from the company, and there was nothing to show that the transferee was a trustee for the company: — *Held*, that the transfer was valid, and not liable to be impeached in equity.<sup>1</sup>

THIS was a motion to discharge an order of the Vice-Chancellor, Sir R. T. KINDESSLEY, by which he ordered that the appellant Leverton Jessopp, who had been placed on the list of contributo-

<sup>1</sup> See 1 Lindley Partn. (Eng. ed. 1860) 615; 2 *ib.* 1126, 1134; *In re National and Provincial Mar. Ins. Co.*, L. R. 2 Ch. Ap. 685.

ries as a member of the company holding 474 shares, should be retained upon the list, and the motion went on to ask that the appellant's name might be excluded from the list. The appellant was the holder of the 474 shares in question for some time previous and up to the month of March, 1856. On the 17th or 20th of that month, the appellant transferred these shares to John \* 639 Charles Spence. \*The transfer was perfectly formal and regular. It was approved by the directors on the 18th of March, 1856, it having, as it appeared, been the custom of the company that transfers should be so approved, although such approval was not required by the company's deed; and on the 25th of March, 1856, the transfer was returned to the registrar of joint-stock companies. It was not disputed, therefore, that on the 25th of March, 1856, at the latest, there was a complete legal transfer of the shares. An order to wind up the company was made on the 1st of November, 1856, and the official manager contended that the transfer, though valid in law, was invalid in equity, on the grounds appearing in the following statement.

The appellant had been a director of the company from the month of September, 1851. The company had fallen into difficulties as early, it would seem, as the month of August, 1855, but certainly in the month of February, 1856. In the latter month, an extraordinary meeting of the shareholders was convened to consider the position and prospects of the company, and to determine on the measures necessary to be adopted. The meeting was appointed for the 13th of February, but there was not a sufficient attendance of shareholders to constitute it. Several, however, of the directors and shareholders were present at the meeting, and signed resolutions to the effect, that it was inexpedient further to carry on the company, that it ought to be wound up under the direction of the Court of Chancery, and that immediate steps should be taken for a preliminary arrangement for the sale of the company's business, and the shareholders be called together to sanction it. The appellant signed these resolutions.

On the 4th of March, 1856, at a meeting of the directors, a shareholder having applied to transfer, the secretary \* 640 \* was desired to communicate to the registrar of joint-stock companies that the company was on the eve of dissolution, and that all transfers attempted were for the purpose of avoiding just liabilities; and the secretary was to request the registrar not

to register any such transfers, at least without notice to the board. At this meeting, also, one of the directors gave notice of motion for the next board meeting, "that the necessary proceedings be taken to procure the winding-up of the company in Chancery."

On the 6th of March, 1856, Mr. Sheridan, then the manager of another insurance company, had an interview with the board of this company on the subject of introducing additional directors, and on other matters, with a view to resuscitate and carry on the business of the company, and it was arranged that he should communicate further with the board upon the matter.

On the 11th of March, 1856, the secretary reported that the registrar of joint-stock companies had informed him that he had no power to stop the transfer of shares; and that the shareholder who had applied to transfer had been permitted to register his transfer; and, in pursuance of the notice given on the 4th of March, it was moved, "that the dissolution of the company be forthwith prosecuted in Chancery, and that the solicitors be instructed to proceed accordingly;" but the motion was lost, there being four votes against it, and three only in its favour. The appellant voted in favour of the motion.

On the 13th of March, 1856, Mr. Sheridan again attended the board, and the following resolution was come to.

"That in consideration of Mr. Sheridan procuring \* and obtaining for this company, either by way of income from the ordinary business of the company or by the issue of shares in this company, being qualifications for officers or otherwise, or by payment of the calls upon shares by shareholders in arrear, the sums following (that is to say): 214*l.* on the 14th of March instant, 786*l.* within one month from this date, 1000*l.* within four months from this date, and 1000*l.* within seven months from this date, he, the said Mr. Sheridan, shall receive and be paid a salary as consulting actuary at the rate of 200*l.* per annum, and shall have given to him or his nominees five hundred shares credited with 5*l.* per share, and shall have given and transferred to him or to his nominees all shares in this company now or to be forfeited within the next three months, and upon which 1*l.* more or less shall have been paid (having such shares given to him or his nominees at the times and in the numbers he may require), and shall be entitled to a period of three months from the date of

each transfer and gift to pay any calls that may be due thereon ; such remuneration being contingent upon his performing the whole of these conditions : provided always, that in case an order should be obtained in the Court of Chancery to dissolve and wind up this company within one month and under such order this company be wound up, then and in such case Mr. Sheridan shall not be entitled to any benefit under this resolution."

On the 14th March, 1856, further resolutions were passed as follows :—

" 1. That 1000*l.* (cash to be advanced), part of the sum of 3000*l.* agreed to be obtained by Mr. Sheridan, was intended to and shall be secured by the bond or promissory note of the company, to bear interest at 5*l.* per cent per annum. Such \* 642 bond or promissory note \* payable at seven months after date, to be renewed for a longer period should Mr. Sheridan continue with the company ; the said bond or promissory note to be deposited as hereinafter mentioned in resolution 3.

" 2. That 214*l.*, part of the second sum of 1000*l.* agreed to be advanced this day, is to be secured to Mr. Sheridan by a promissory note of the company at two months date from this day ; but in the event of the agreement above referred to not being cancelled or put an end to within the first month, then such last-mentioned promissory note is to be cancelled, and the said sum of 214*l.* form part of the first 1000*l.* referred to in the previous resolution.

" 3. That a bond or promissory note for such sum of 1000*l.* shall also forthwith be prepared and bear date this day, such bond or promissory note to be lodged in the hands of Mr. , to be by him held on behalf of Mr. Sheridan and the company until the balance of the second sum of 1000*l.* shall be paid by Mr. Sheridan to or on account of the company ; and that upon such payment being certified to the said Mr. by the secretary for the time being of the said company, such bond or promissory note to be handed to Mr. Sheridan, or as he may direct.

" 4. That in the event of Mr. Sheridan failing to provide the whole sum of 3000*l.*, but providing any sum exceeding one-fourth of such amount, he shall be entitled to any benefits accruing to him under the resolution of yesterday's date hereinbefore referred

to, but proportionably only to such amount of money as he may actually provide beyond such one-fourth.

" 5. That a statement of the assets and liabilities of \* the company shall forthwith be made out and signed for \* 643 Mr. Sheridan.

" 6. That each director who has advanced money to the company on bond, bill, debenture, or otherwise, will undertake to transfer of and from the same a payment of thirty shillings per share on the shares held by them in the capital stock of the company.

" 7. That no shares are to be allotted or otherwise dealt with by the board without the knowledge, consent, and approbation of the said Mr. Sheridan.

" 8. That Mr. Sheridan be entitled (*ex officio*) to take a seat at all meetings of the directors, and to take part in the business at all such meetings.

" 9. That all valuations and special calculations that may be required for the company be made and paid for irrespective of the salary hereinbefore agreed to be paid Mr. Sheridan, the object of that gentleman's appointment being to generally superintend and advise on the affairs of the company, and not to undertake calculations.

" 10. That in the event of Mr. Sheridan finding the said sum of 3000*l.* at the time and in the manner hereinbefore agreed, and the company continuing to carry on the business beyond the said period of seven months, the yearly salary or remuneration agreed to be paid Mr. Sheridan shall be continued to him during good behaviour in his said office of consulting actuary.

" 11. That the said Mr. Sheridan shall have the nomination of a secretary to this company at a salary to commence at 200*l.* per annum and to increase at the rate of not less than 25*l.* per annum, and shall also be \* permitted to nominate for \* 644 appointment the other officers of the company.

" 12. That a commission of 20*l.* per cent shall be paid to Mr. Sheridan on all moneys received from sale of shares which shall be sold through his means, influence, and agency (so that no double commission be paid), and also a commission of 5*l.* per cent upon the premiums received from all insurance business transacted by the company from the date of his appointment as

consulting actuary, so long as the policies issued in respect of such premiums shall continue in force."

Mr. Jessopp was present at the meetings of the 13th and 14th of March, but did not sanction or approve of the resolutions, and the evidence showed that he was throughout determined not to continue in the company, if the arrangement with Mr. Sheridan was carried into effect.

On the same 14th of March there was an agreement come to between the appellant and Mr. Sheridan, which was as follows :—

" Mr. Jessopp undertakes, on his shares being transferred and registered in the name of a respectable person approved by him, to give up bonds to meet a further call of 1*l.* per share on his shares (making 2*l.* 10*s.* paid) to be credited upon such shares at once, and further to give in an additional bond for 250*l.* to be credited in like manner upon the said shares on the loan from the "Argus" for 2000*l.* being satisfied, or Mr. Jessopp being absolutely relieved from all personal liability in respect thereto.

" L. JESSOPP."

\* 645     \* " I accept the above in explanation of the resolution passed this day. 14th March, 1856.

" H. B. SHERIDAN."

It was in pursuance of this agreement that the transfer to Spence was made, and Spence was the nominee of Mr. Sheridan, and was to deal with the shares according to Mr. Sheridan's directions. He paid no consideration to the appellant for the transfer. On the contrary, it appeared by the evidence that the appellant was a creditor of the company to a large amount, and that he gave up the debt which was due to him to be credited by way of further call on the shares transferred, thus rendering them more valuable and more available for the purpose which Mr. Sheridan had suggested of introducing new and responsible directors and officers into the concern, with a view to its being carried on.

Under these circumstances the Vice-Chancellor held that the transfer was invalid in equity, and made the order now under appeal.

*Mr. Baily* and *Mr. Roxburgh*, for Jessopp.—There was here a *bond fide* out-and-out transfer to Spence. It may be that he was only a trustee for Sheridan, but that does not affect us. The benefit of the shares was to go to Spence or Sheridan, not to the company. The object of Mr. Jessopp was not to promote the arrangement with Sheridan, but to get out of the company; to effect this he transferred his shares, as he had a perfect right to do, to an individual who was perfectly competent to take a transfer of them, and took it not for the benefit of the company but for his own. That there were arrangements between him and the company which induced him to take the transfer is a mere question of motive with which we are not concerned.

\*The *bona fides* of Mr. Jessopp is shown by his having paid a large sum to get rid of his shares, which proves that his object was to get rid of his liability as shareholder, not to facilitate arrangements for the supposed benefit of the company. As the consent of the directors was not needed, the present case is wholly untouched by *Bennett's Case*, (a) but *Ex parte Libri, Re The Kilbricken Mining Company*, (b) is in our favour.

*Mr. Glasse* and *Mr. Hamilton Humphreys*, for the official manager.—Mr. Jessopp was a director, and it was therefore his duty to see that the transfer was fair and proper, more so than if he had been merely a shareholder. *Ex parte Bennett* (a) and *Ex parte Brown* (c) lay down rules which govern the present case. A transfer by a shareholder to the company is clearly bad, a transfer to a nominee of the company as a trustee for the company is in the view of a Court of Equity no better. Here the transfer was not made *bond fide*, it was made as part of a scheme for handing over the company to Sheridan in a way which was a gross breach of duty on the part of the directors. The assent of the directors to the transfer was given from improper motives, just as much as in *Bennett's Case*.

[THE LORD JUSTICE KNIGHT BRUCE.—Was not the assent of the directors necessary to the validity of a transfer in *Bennett's Case?*]

(a) 5 De G., M. & G. 284.      (b) 30 Law T. 185.      (c) 19 Beav. 97.

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It was practically necessary here, as it was always required. This was substantially a transfer to the company. If the shares had turned out valuable, the company would have had the benefit.

*Mr. Baily*, in reply. — The transfer was not to a trustee \* 647 for the company, \* there being nothing to show that the company had any thing further to do with the shares which Sheridan took. The transfer was not made to further an illegal scheme, but because Mr. Jessopp wished not to have any thing more to do with the company.

Judgment reserved.

June 26.

The Lord Justice TURNER, after stating the facts of the case in nearly the same terms as above, proceeded as follows : —

Upon these facts it was contended on the part of the official manager that this transfer was not *bond fide*; that it was contrived and designed for the purpose of giving effect to the arrangement between the directors and Mr. Sheridan, and was part of that arrangement; that the directors in entering into that arrangement had exceeded their powers, and that the transfer, therefore, could not be maintained. On the other hand it appears, and it was upon these facts the appellant's case was rested, that, according to the constitution of the company, it was competent to shareholders to transfer their shares without limit or restriction; that the appellant had, before the 14th of March, 1856, supported the proposals which had been made for winding up the company; that he was not satisfied with the measures proposed by Mr. Sheridan for resuscitating it, and had come to the determination that it should either be wound up or that he would dispose of his shares, and he alleges that the agreement between him and Mr. Sheridan resulted from that determination. No doubt is cast by the evidence upon the character or respectability of Spence at the time when the transfer to him was made, and the sacrifice \* 648 \* made by the appellant in giving up the debt which was due to him was much relied upon on his part in proof of the honesty and *bona fides* of the transaction.

An attempt seems to have been made on the part of the official manager to establish that the transfer of the shares to Spence was made in trust for or for the benefit of the company, but there seems to be no ground for this suggestion, except in so far as the company might be benefited by the introduction of new members through the medium of Mr. Sheridan. It is upon these conflicting views of the case we have to determine the point whether the transfer of these shares, undoubtedly valid at law, was invalid in equity.

That the transaction was fairly and honestly intended I entertain no doubt whatever. If it can be impeached at all, I think it can only be impeached by reason of its connection with the arrangement with Mr. Sheridan, which seems to me, as at present advised, to have been an arrangement which the directors were not justified in entering into. At all events I assume it to have been so ; for, if not, no question can arise, as there could then be no breach of duty, and nothing to affect or control the absolute power which the appellant had to dispose of his shares. Assuming, then, that the arrangement with Mr. Sheridan was a breach of duty on the part of the directors, does it follow that the transfer of these shares was impeachable in equity ? I am of opinion that it does not, for I think the fair result of the evidence is that the transfer of these shares did not induce the arrangement, but that the arrangement induced the transfer, and therefore that the breach of duty, assuming that there was one, was not the result of the transfer. It cannot, I think, be said that the appellant was party to the arrangement, any otherwise than that he was present when it was \* made, for it is plain that he refused to continue in \* 649 the company if the arrangement was carried into effect. He was in this position : the majority of the directors determined, against his will, to adopt the arrangement, and he had no remedy but to transfer his shares or to wind up the company. The shareholders of the company could not, I think, set aside the transfer upon the ground that the appellant did not proceed to wind up the company. They could not surely constitute the appellant a trustee for them of his power to wind up, and if they could not impeach the transfer on that ground I see no other ground on which they could claim to impeach it, except that the appellant transferred to the person through whom the arrangement was to be carried into effect. The appellant, however, had originally an

unrestricted right of transfer, and I think it very difficult to say that, when the arrangement had been made, his right to transfer became restricted, even as to Mr. Sheridan. I can go no further than to say that a Court of Equity would watch such a transaction with jealousy ; that if it was connected with any unfairness or dishonesty, I do not think it could stand, but that if it was, as in this case I think it was, in all respects fair and honest, I do not think it could or ought to be set aside.

In the course of the argument before us, *Bennett's Case (a)* was much relied on upon the part of the official manager, but I think that case has no application to the present. There, the acceptance of the transfer by the directors was a breach of duty on their part ; but here, if I am right in the view which I have taken of the case, there was no such breach of duty.

\* 650 Upon the whole case, therefore, my opinion is, that \* the transaction in question ought to be upheld. The order must accordingly be to discharge the Vice-Chancellor's order, and to strike the appellant's name out of the list of contributories.

THE LORD JUSTICE KNIGHT BRUCE.—In my opinion also we may, consistently with what this Court did in Bennett's or the Cameron case, and we ought to hold in the present instance that the transfer to Mr. Spence was legally and equitably effectual to make Mr. Jessopp cease to be a shareholder, and that he did accordingly cease to be a shareholder in the company in question, and that he is not a contributory. I agree in the order which my learned brother has proposed.

(a) 5 De G., M. & G. 284 [Am. ed. note (1)].

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## TUCKER v. LOVERIDGE.

1858. June 11, 12, 26. Before the LORDS JUSTICES.

T. by a settlement covenanted with the trustees that, in the event of his dying in the lifetime of his daughter C. H. T. before she should have attained twenty-one or married, his heirs, executors, or administrators should within six months after his decease pay to the trustees 10,000*l.*, with interest thereon from the day of his decease; and it was declared that, in the event of C. H. T. having no child who should attain twenty-one or marry, then the fund, after her decease, should form part of T.'s personal estate. By the same deed T. charged all his real estate with this sum. T. afterwards, in consequence of a requisition made by persons who were advancing him money on mortgage, paid the 10,000*l.* to the trustees, who released the estate from it. The trustees subsequently lent part of this sum to T. himself, on mortgage of part of the estates originally subject to the charge, and the rest of it to other persons. T. died, leaving a will, by which he bequeathed his personal estate to the plaintiff and his real estate to the defendant. C. H. T. died an infant and unmarried within five months after his death: *Held*, that no part of the 10,000*l.* belonged to the devisees of the real estate, but that the whole belonged to the legatee of the personality.

THIS was an appeal by Charles Tucker, Marwood Tucker, and Marwood Tucker the younger, three of the defendants, from an order of Vice-Chancellor STUART, declaring that a certain sum of 10,000*l.* formed \* part of the personal estate of \* 651 William Tucker, the testator in the cause, the contention of the appellants being that it belonged to the devisees of his real estate. The facts of the case were as follows:—

The testator had, by indenture dated the 23d of June, 1849, reciting his desire to make a provision for his daughter Catherine Helen Tucker and her issue, covenanted with the defendant Charles Warre Loveridge and H. B. S. King, that in case Catherine Helen Tucker should live to attain the age of twenty-one years, or should marry under that age, with the consent of the testator, or of her guardian or guardians for the time being, or in case the testator should die in the lifetime of Catherine Helen Tucker, and before she should have attained twenty-one, or have married with such consent as aforesaid, then and in either of such cases the testator, his heirs, executors, or administrators, would, immediately upon Catherine Helen Tucker so attaining the age of twenty-one years, or marriage with such consent as aforesaid, or in case of the death

of the testator in the lifetime of the said Catherine Helen Tucker, and before she should have attained twenty-one, or have married with such consent as aforesaid, then within six calendar months next after his decease, pay or cause to be paid to Charles Warre Loveridge and H. B. S. King, or the survivor of them, or the executors or administrators of such survivor, their or his assigns, the sum of 10,000*l.* with interest for the same at the rate of 5*l.* per cent per annum, by half-yearly payments, until the day of actual payment, the first payment of interest to be made on such one of the days appointed for payment of interest as should happen next after Catherine Helen Tucker should have attained the age of twenty-one or have previously married with such consent as aforesaid ; and further, that in case the testator should die in the

\* 652 lifetime of Catherine Helen \* Tucker, and before she should

have attained the age of twenty-one years, or should have previously married with such consent as aforesaid, then the heirs, executors, or administrators of the said William Tucker should within six calendar months after his decease, pay to the said trustees or trustee, the said sum of 10,000*l.* with interest thereon at the rate aforesaid, from the day of the decease of the testator, until the day of the actual payment thereof. The testator then charged all his real estates with the payment of the 10,000*l.* to the trustees. The trusts declared of the sum of 10,000*l.* were to invest it, to apply all or such part of the income as the trustees should think fit for the maintenance of Catherine Helen Tucker, during her minority and discoverture, and accumulate the residue, and upon her attaining twenty-one, or marrying with consent, to stand possessed of the trust fund, and its accumulations, upon trust to pay the income to her for life, for her separate use, and after her death, upon trust for her children, with an ultimate declaration, that if there should be no child of Catherine Helen Tucker, who, being a son, should attain twenty-one, or, being a daughter, attain that age or marry, the trustees should stand possessed of the trust premises, or of so much as should not have become vested, or been applied under any of the trusts or powers therein contained, "in trust as part of the personal estate of the said W. Tucker, and to be paid over, transferred, and assigned accordingly."

In the year 1852, the testator negotiated a loan with the Atlas Insurance Company, who required that the above charge should be

satisfied, and an arrangement to that effect was come to. The company on the 6th October, 1852, advanced to the testator 39,000*l.* on mortgage of his estates, and in pursuance of the arrangement \* 10,000*l.*, part of the sum secured by the \* 653 mortgage, was, by the direction of the testator, paid to Charles Warre Loveridge and H. B. S. King, and a release for the 10,000*l.* was indorsed on the deed of June, 1849, and executed by Loveridge and King.

On the 7th of October, 1852, Loveridge and King advanced to the testator on mortgage of the same estates 2500*l.*, part of the 10,000*l.*, and on the same day they lent 3500*l.*, being a further part thereof, to John Tatchell (afterwards Bullen), on mortgage of certain freehold lands belonging to him. On the 2d of December, 1852, the sum of 2000*l.*, being a further part of the 10,000*l.*, was advanced to Charles Warre Loveridge in the name of his co-trustee H. B. S. King, on a mortgage of the great tithes of Broad Windsor in Dorsetshire; and on the 27th of April, 1853, the residue, amounting to 2000*l.*, was lent to the testator on the security of a further charge on his real estates.

About the end of October, 1853, Charles Warre Loveridge and H. B. S. King, at the request of the testator, consented to a postponement of their charges for 2500*l.* and 2000*l.* on his estates to a charge for securing a further sum of 3500*l.* advanced to him by the Atlas Insurance Company, it being part of the arrangement, as appeared by a memorandum of the 26th of October, 1853, signed by the testator, that if the sum of 3500*l.*, advanced to Mr. Tatchell, should be paid off, it should be applied in payment of the 3500*l.* lent by the insurance company, and that upon such payment being made, the security given to the company for that sum should be transferred to Loveridge and King.

No further dealings with the 10,000*l.* took place during the testator's life.

\* The testator died on the 11th of March, 1855, leaving \* 654 a will, by which, after giving a small pecuniary legacy and some specific legacies, he bequeathed the residue of his personal estate to his widow, and devised his real estate to trustees, in trust by mortgage to raise money to pay his funeral and testamentary expenses, debts, legacies, and legacy duty, in absolute exoneration of his personal estate, and, subject thereto, in trust for his widow

for life, with limitations over, under which the appellants were beneficially interested.

Catherine Helen Tucker died on the 13th of July, 1855, under the age of twenty-one years and unmarried, having survived the testator for about four months.

The bill was filed by the widow for the purpose of having the debts and legacies paid out of the real estate, and of having the personal estate ascertained and paid to her. The chief clerk, in answer to an inquiry directed by the decree, found the facts above stated as to the dealings with the 10,000*l.* It appearing that the real estate was much more than sufficient to pay every thing to which it was liable, Mrs. Tucker presented her petition, praying for a declaration that the 10,000*l.* was part of the personal estate of the testator, and for a transfer of it to her. Vice-Chancellor STUART made a declaration and order as prayed, and from this order the present appeal was brought.

*Mr. Malins* and *Mr. Osborne*, for the appellants.—We contend, firstly, that the whole 10,000*l.* belongs to the devisees. Catherine Helen Tucker having died unmarried, under age, and within six months after the decease of the testator, the money never became

raisable. The Court would not have directed it to be raised \* 655 before \* the appointed time: *Evans v. Scott*; (a) and payment to the trustees before the time did not discharge the estate. *Dickinson v. Dickinson*. (b) If the trustees had misapplied it, the estate would have been liable to pay it over again, had it become raisable. The reasoning in *Lechmere v. Earl of Carlisle* (c) helps the appellants' case, for it turns on the point that the trustees could have compelled payment during the settlor's life; here the trustees were never in a position to compel payment. The sum never having become raisable, the trusts of it never came into operation, so the ultimate declaration that it should become part of the settlor's personal estate could not take effect. That it actually was raised, but not according to the trust, does not alter the case: it was raised only for a particular purpose in consequence of a requisition by mortgagees. Supposing, however, that the Court does not go with us to this extent, we say

(a) 1 H. L. Cas. 43. (b) 3 Bro. C. C. 19. (c) 3 P. Wms. 211.

[ 514 ]

that the 4500*l.* at all events belongs to the devisees, for it was lent to the testator on mortgage of this same property, and the contingency never having happened on which it ought to have been raised, it was "at home," and there is no equity to have it taken out of the estate again. Then as to the further sum of 3500*l.*, the testator directed it to be applied in paying off a mortgage on the estate: this is tantamount to a direction to invest in real estate, and the money must go to the heir. *Chaplin v. Horner.* (*a*) [*Godesal v. Webb* (*b*) was also referred to.]

*Mr. Bacon* and *Mr. Hanson*, in support of the order.—The testator chose to raise the money, and having been raised it was personality. That the raising it before \*the time \*656 did not effectually discharge the estate is nothing to the question; the testator could not complain that he had raised it too soon. The fund came into the hands of the trustees as money, and at no time during the testator's life had he such a title to it as enabled him to recall it, and his borrowing it from the trustees is an acknowledgment by him that he could not reclaim it. A mortgage having been made for raising this money, the *cestui que trust*, though entitled to repudiate the transaction, was entitled to affirm it, and claim the benefit of it: *Hardey v. Hawkshaw*; (*c*) and the observations of the Master of the Rolls show that the intention of the testator is not material. The money was never at home in the testator's hands. The principles governing the case are laid down in *Barham v. Earl of Clarendon*. (*d*) We admit that if the daughter had died in the testator's lifetime the money would have been, at home; but at his death trusts were subsisting under which it might duly have been raised, it not being necessary to wait till the end of the six months.

*Mr. F. J. Wood*, for the trustees.

*Mr. Osborne*, in reply.

Judgment reserved.

(*a*) 1 P. Wms. 488.

(*b*) 2 Keen, 99.

(*c*) 12 Beav. 552.

(*d*) 10 Hare, 126, 182.

June 26.

THE LORD JUSTICE KNIGHT BRUCE. — As to 2000*l.*, part of the 10,000*l.* in question upon this appeal, I mean the 2000*l.* advanced in December, 1852, to Mr. Loveridge, on the security of the tithes of Broad Windsor, the title of the plaintiff, the legatee of \* 657 \* the personality of the testator Mr. Tucker, is very plain and clear.

The appellants' claim to the residue, or at least to a portion of the residue, of the 10,000*l.* was arguable. Notwithstanding, however, that the daughter of the testator had very possibly a right to say that the charge created by the original settlement, the deed of 23d June, 1849, in her favour upon his real estate was not removed or affected during his life, at least in equity, I am apprehensive, indeed am of opinion, that he was bound by all the deeds that he appears to have executed, and probably by the instrument, not under seal, dated 26th October, 1853, also, bound I mean equitably as well as legally, so long at least as that right, if she had it, was not exercised by her or on her behalf, which it never was. She survived him, and died a minor, without having been married, so that if none of the instruments, not testamentary, which were intermediate between the original settlement of the year 1849 and his death, had existed, his widow, the plaintiff, would, I suppose, have been wholly wrong in her contention as to the 10,000*l.* Those transactions, however, have, I apprehend, made an important difference. The 4500*l.* secured by the deeds of 7th October, 1852, and 27th April, 1853, on the testator's real property, did not, I think, become absolutely or conditionally or contingently merged in his real estate. That sum was at and before the time of his death a debt from him in which he had in equity an interest, but only a limited interest, while he was living. It was at the time of his death, and immediately before and immediately after that event, uncertain (humanly speaking) whether his daughter would marry or attain majority, and whether she would become absolutely entitled to the capital; nor was it possible, in my opinion, for him immediately before his death, \* 658 or his successors \* in his real estate afterwards, to say that the 4500*l.* stood merely on the footing on which the 10,000*l.* would have stood if none of the deeds subsequent to the original settlement of 1849 had been executed, and the instrument, not under seal, dated the 26th October, 1853, had not existed.

If the appellants' case cannot, as I think that it cannot, be supported as to the 4500*l.*, it must, I conceive, and possibly *a fortiori*, fail as to the 3500*l.* advanced in October, 1852, to Mr Bullen, notwithstanding the instrument, not under seal, dated 26th October, 1853, which does not appear to me to prejudice the plaintiff's title.

Therefore, though the case is perhaps a hard one, I must hold that the appeal entirely fails.

THE LORD JUSTICE TURNER.—This is a question whether the sum of 10,000*l.* in dispute between the parties, or any portion of that sum, belongs to the devisees of the real estate of William Tucker, the testator in the cause, or whether the whole of that sum belongs to the testator's widow, the legatee of his personal estate. The Vice-Chancellor, Sir JOHN STUART, has decided that the whole of the sum in question belongs to the widow, and the parties interested in the real estate have appealed from that decision.

By an indenture dated the 23d of June, 1849, William Tucker, the testator, covenanted, &c. [His Lordship here stated the substance of that deed.] Some time after the execution of this deed, and in the year 1852, the testator borrowed a large sum of money upon mortgage of his real estates, and upon the occasion of \*this mortgage the mortgagees required that the charge created by the deed of covenant of the 23d of June, 1849, should be satisfied. The testator accordingly raised the sum of 10,000*l.*, and paid it over to the trustees of the deed of covenant, who thereupon executed a deed, purporting to release the estates charged by the deed from the charge created by it. The testator afterwards died upon the 11th of March, 1855, having by his will bequeathed his personal estate to his widow, exempt from his debts, and disposed of his real estates in favour of the appellants. The testator's daughter Catherine Helen Tucker survived him, but she died on the 13th of July, 1855, within six months, therefore, after the testator's death. She died an infant, and without having been married. These are the only facts material to be stated, so far as respects the claim of the appellants to have the whole of the 10,000*l.*, considered as belonging to the real estate, and, in my opinion, they furnish no ground whatever for that claim.

Several points were urged on the part of the appellants in sup-

port of their view on this part of the case. It was said on their part, that Catherine Helen Tucker, not having married, and not having attained the age of twenty-one, the trust of the deed of covenant under which the 10,000*l.* was to become part of the testator's personal estate never arose. Again, it was said that the trusts of the deed of covenant having come to an end before the expiration of six months from the testator's death, the payment of the 10,000*l.* could not have been compelled; and, further, it was said that the release of the trustees did not discharge the estate from the 10,000*l.*, but that Catherine Helen Tucker, had she survived and become entitled, could have resorted to the estate for payment of that sum, and that the 10,000*l.* was put in the

\* 660 hands of the trustees only for the convenience of \* the mortgagees. None of these arguments, however, seem to me to touch the question before us. The question is between the real and the personal estate of the testator. The 10,000*l.* was raised from the real estate, and in my view of the case, it must, as I think, have become part of the personal estate. It must have become so under the trusts of the deed, if those trusts took effect, and if not, it must, as I apprehend, have become so under a resulting trust. It could not, as it seems to me, be the less part of the personal estate, because the testator may not have been compellable to pay it, or because the estate charged with it may not have been well discharged, or because it may have been lodged with the trustees for the convenience of the mortgagees. The arguments on this point on the part of the appellants, when followed out to their legitimate consequences, would, I think, require us at least to assume that if the claim for the 10,000*l.* under the covenant had come to an end in the testator's lifetime, he would have required that sum in the hands of the trustees to be applied in discharge of the mortgage, which he had created for the purpose of raising it, but I can find no authority, and I can see no principle, which would warrant us in making that assumption. The appellants' case, therefore, in my opinion, wholly fails as to the entire sum of 10,000*l.*

It appears, however, that the trustees lent to the testator on mortgage 4500*l.*, part of the 10,000*l.* in their hands, and it is contended on the part of the appellants, that this 4500*l.* at least ought to be considered to belong to the real estate. It was said, on the part of the appellants, that this sum was, to use the language of the cases, "at home." It never was, however, at home in the

testator's lifetime, for up to the time of his death the trustees had an undoubted right to call for the payment of it; and I apprehend that, as between the appellants and \*the widow, \* 661 no right of any third party intervening, the rights must stand as they stood at the time of the testator's death. Besides, the observations which have been made as to the assumption with respect to the mode in which the testator would have required the 10,000*l.* to be dealt with, seem to me to apply equally to this sum of 4500*l.*

The appellants' argument as to the 3500*l.*, which the testator directed to be applied in discharge of his mortgage to the Atlas Insurance Company for that amount, stands, I think, upon the same footing; for upon that payment being made, the Atlas mortgage was to be assigned to the trustees. I am of opinion, therefore, that this appeal must be dismissed, and I think it should be dismissed with costs.

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\* ROGERS v. THE OXFORD, WORCESTER AND \* 662  
WOLVERHAMPTON RAILWAY COMPANY.

1858. June 10, 22, 29. Before the LORDS JUSTICES and Mr. Justice ERLE.

By an Act of 1846, a railway company was authorized to purchase the S. canal, and was bound to maintain the canal and keep it open for traffic when purchased. By this Act it was provided, that as soon as the purchase was completed the railway company might exercise all the rights, powers, and privileges which the canal company might before the sale have exercised in relation to the canal under any Acts relating to the canal which might be in force at the time of the conveyance. The canal company did not, before the sale, take any steps to adopt the powers of 8 & 9 Vict. c. 42 (the "Act to enable canal companies to become carriers of goods upon their canals"). After the purchase the railway company proceeded, under the 8th section of the last-mentioned Act, to take a lease of the tolls of the W. canal. The clerk of the G. canal company, which was likely to be injured by the granting of the lease, took shares in the railway company and filed a bill, on behalf of himself and the other shareholders, to prevent the acceptance of the lease, as being *ultra vires*.

*Held*, that by the purchase of the S. canal the railway company had become a canal company, so as to be entitled to avail itself of the powers given to canal

companies by the 8 & 9 Vict. c. 42, and that the taking of such lease was therefore not *ultra vires*.<sup>1</sup>

Whether, if the acceptance of the lease had been *ultra vires*, the Court would have declined to interfere, on the ground that the bill was filed by the nominee of another company with a view solely to the interests of that company, *quære*.

THE question in this case was, whether the Oxford, Worcester, and Wolverhampton Railway Company, which had, under the authority of a private Act, purchased the Stratford-upon-Avon Canal, had thereby become entitled to exercise the powers given to canal companies by the Act 8 & 9 Vict. c. 42, intituled, "An Act to enable canal companies to become carriers of goods upon their canals," and so enabled, without any further statutory authority, to take a lease of another canal.

The Oxford, Worcester, and Wolverhampton Railway Company was incorporated by "The Oxford, Worcester, and Wolverhampton Railway Act, 1845," 8 & 9 Vict. c. 184. By an Act 33 Geo. III. c. 112, a company had been incorporated for making a canal from Stratford-upon-Avon to a point on the Worcester \* 663 and \* Birmingham Canal, some miles south of Birmingham, and this canal, called the Stratford-upon-Avon Canal, had been made.

By an Act 9 & 10 Vict. c. 278 intituled, "An Act to authorize certain alterations in the line of the Oxford, Worcester, and Wolverhampton Railway Company, and to amend the Act relating thereto," it was among other things enacted by the twenty-first section, that, subject to the provisions thereafter contained, it should be lawful for the railway company to purchase, and for the proprietors of the Stratford-upon-Avon Canal Navigation to sell to them, "the said navigation, with all the lands, buildings, wharfs, quays, locks, and other works connected therewith, or held and enjoyed by the said company of proprietors, and all boats, barges, stock, and implements of the said company of proprietors employed in connection with the said navigation, and all maps, books, and papers relating to the said navigation, in their possession or under their control, and all their powers, rights, and privileges in relation to the said navigation" upon such terms, and for such price or consideration, as might be or had been agreed on

<sup>1</sup> See Kerr Inj. 561.

between the said two companies, subject to a proviso for determining this power of purchase in a certain event, which never happened. The Act then contained provisions as to the completion of the purchase. Similar powers were given for the purchase of the Stourbridge Extension Canal. It was further enacted, sect. 24, "that when and so often as the said Stratford-upon-Avon Canal Navigation and the said Stourbridge Extension Canal, or either of them, shall have become vested in the said railway company under the provisions hereinbefore contained, it shall be lawful for the said railway company to have and hold the same, and to use, exercise, and enjoy all the rights, \* powers, and privileges of the company conveying the same, which such company could or might have lawfully used, exercised, or enjoyed in relation to such canal or navigation prior to the sale or transfer thereof to the said railway company, under or by virtue of the provisions of any Act or Acts of Parliament relating to such canal or navigation, and which may be in force at the time of the conveyance thereof, but subject to such restrictions, conditions, limitations, and provisions, as in such Act or Acts may be contained in reference to the maintenance and use of such canal or navigation, or to the use of any other canal or navigation communicating therewith." Sect. 27 provided for the application of the purchase-moneys for the two canals in payment of the debts of the canal companies respectively, and for the distribution of the surplus among the shareholders in those companies, and enacted that, after the completion of the purchases, and the distribution of the purchase-moneys, in manner thereby authorized, the canal companies respectively should be dissolved and cease to exist, save only as respected, and for the purposes of, the satisfaction of any existing debts or liabilities of the canal companies respectively, and the general settlement of the affairs thereof. Section 30 provided, "that from and after the transfer of the said Stratford Canal, and Stourbridge Extension Canal, to the said railway company, the said last-mentioned company shall and they are hereby required to maintain the said canals, and the reservoirs and feeders thereof, in an efficient state of repair, and to provide a proper supply of water, so as to keep the said canals open for the purposes of traffic, and navigable for all parties desiring the use of the same." Sect. 31 fixed the maximum rates of tolls to be taken on the canals. Sect. 32 provided against the giving undue preference to any per-

sons in the use of the canals ; and sect. 33 gave a power to \* 665 the board \* of trade to call upon the railway company to remedy any inconvenience arising to the public from the transfer of the canals to them, and to call upon the company, if necessary, to introduce into Parliament bills for that purpose, and, in default of their so doing, to introduce such bills at the expense of the company. By sect. 39 it was enacted, that nothing in the Act contained should exempt the railway from the provisions of any general Act relating to railways, or to canals amalgamated with railways, which might pass during the then present or any future session of Parliament, or from any future revision and alteration under the authority of Parliament of the maximum rates of fares and charges, authorized by the now existing Act.

On or before 1st May, 1857, the railway company completed the purchase of the Stratford Canal, and took upon themselves the management of it. The canal company was thereupon dissolved, having never before its dissolution in any way adopted the powers and provisions of the Statute 8 & 9 Vict. c. 42.

In January, 1858, the railway company entered into an arrangement with the Worcester and Birmingham Canal Company to take a lease of the Worcester and Birmingham Canal under the power given to canal companies for such purposes by 8 & 9 Vict. c. 42.

Large quantities of salt from the great mines at Droitwich are brought to London from Worcester by canal, the principal part of the line of communication being the Grand Junction Canal. Part of the Stratford Canal must be used in order to take the most direct route, but goods can be brought from Worcester to London without using that canal. It is, however, impossible to pass

\* 666 from Worcester to London wholly by canal without using \* part of the Worcester and Birmingham Canal. The tolls authorized to be taken for salt on the Worcester and Birmingham Canal were twelve times greater than those which had for many years been taken on that canal, and it was alleged by the bill that it was the intention of the railway company, when they had obtained the proposed lease, to raise the tolls, so as to prevent the carrying of salt from Droitwich to London by canal.

The plaintiff, who was described in the bill as clerk to the Grand Junction Canal Company, was also the holder of 100*l.* stock in the railway company, which, it appeared, he had obtained for the purpose of instituting this suit, and he filed the present bill,

on behalf of himself and all other the stockholders in the railway company, against the company and their secretary, to restrain the company from taking the proposed lease, alleging that it was in excess of their parliamentary powers.

An application for an injunction was refused by the Master of the Rolls, and was renewed before the Lords Justices. Their Lordships directed it to stand over and to come on again before them with a motion of decree.

June 10.

*Mr. Roundell Palmer* and *Mr. Bush*, for the plaintiff. — We submit that, on the general policy and the fair construction of the Acts, what the defendants are seeking to do is not authorized. They are proceeding under the powers of 8 & 9 Vict. c. 42. The 24th, which is the principal clause of the private Act defining the powers of the railway company in respect of the canal, limits them in three ways. The powers which the railway company is to exercise are to be: (1) Such as the canal company could have exercised in relation to the Stratford \*Canal; and \*667 section 21 and other clauses of the Act import a similar limitation. Now the power which the railway company is assuming to exercise is wholly unconnected with this canal; (2) They must be powers which the canal company could have exercised prior to the sale or transfer to the railway company. This power is one which the canal company could not have exercised before the sale, for it had never taken the steps prescribed by 8 & 9 Vict. c. 42, § 12, to enable it to proceed under that Act; (3) They must be powers exercisable by virtue of any Act or Acts relating to such canal. The 8 & 9 Vict. c. 42, did not relate to this canal, as the steps prescribed by sect. 12 had not been taken; we submit, therefore, that sect. 24 of the private Act did not transfer this power.

Now, as to the general Act, we say that it was intended to apply only to canal companies, *i.e.*, companies of which canal navigation is the sole or principal object. This, we submit, is the fair interpretation of sect. 1, and both that and section 7 distinguish canal and railway companies from each other. The defendants' company is to all intents and purposes a railway company, not a canal company, and to hold it to have the powers now claimed would be most mischievous. The legislature passed the Act 8 & 9 Vict. c. 42, to secure competition for the public advantage, and it

is likely to have that effect if its operations be confined to real canal companies ; but if its effect be what the defendants say, a railway company, having a short canal at one end of its line, might buy up another canal at the other end, for the purpose, not of promoting canal navigation for the benefit of the public, but of virtually stopping a line of canal communication in order to force the traffic on to the railway, and this is what the defendants are doing here. There is no restriction as to locality in the

\* 668 general \* Act ; a canal company may take a lease of any other canal, no matter where ; a degree of license quite reasonable with respect to real canal companies, but most mischievous as to railway companies which may happen to possess canals. This shows that such companies cannot have been within the contemplation of the legislature in passing the Act 8 & 9 Vict. c. 42.

*Mr. Selwyn* and *Mr. Jessel*, for the defendants.—This is a bill filed by a nominee of the Grand Junction Canal Company solely to promote their interests, and without any view to the benefit of the shareholders in the railway company ; even on this ground alone the bill ought to be dismissed. Then as to the powers given to the defendants by the Act, if there is any doubt as to the legality of what they are doing, the question ought to be left to be tried at law, but we submit that the case is clear. The other side do not dispute that the Stratford Canal Company could have taken this lease, if their undertaking had not been sold : we stand in their place. We claim their powers as given to us by the private Act. We also claim the powers given to canal companies by 8 & 9 Vict. c. 42. It is too clear for argument, that a company, which like the St. Helen's Canal and Railway Company is originally a canal company as well as a railway company, might exercise these powers ; then why not a company which after its creation becomes a canal company as well as a railway company ? We became by the purchase a canal company, for surely a body of proprietors lawfully holding a navigable canal under an Act of Parliament, and authorized and bound to carry it on, is a canal company. The Stratford Canal Company had up to the time of sale power to adopt the general Act, and this power is transferred to us by the sale. The general Act was clearly intended to apply to

\* 669 the owners of all canals, the words "trustees" or under-

takers" in the 1st section show that it was not intended to apply only to such canal companies as the plaintiff contends. The general object of the Act, so far as concerns the relation of canal companies to each other, is to put an end to the inconveniences arising from conflict of interest between them, and most of the clauses clearly must apply to railway companies entitled to canals. The wording of the 12th section shows in fact that the Act is not confined to companies at all, but was intended to apply to any owners of a canal. The plaintiff relies on the 24th section of the private Act, but that section is enabling, not prohibitory, and therefore cannot take from us any thing which the general Act would give. There is not a single restrictive clause in the private Act, its general object was to place us in the same position as the canal company which sold to us. If the plaintiff's argument is right, we could not avail ourselves of the powers of 8 & 9 Vict. c. 28, which would evidently disappoint the intention of the legislature.

*Mr. Palmer*, in reply.—The preamble to 8 & 9 Vict. c. 42, shows that the intention of Parliament was to deal only with canal companies "incorporated or established under the authority of Parliament;" this must mean incorporated for the purpose of working canals, which this company was not. If the construction for which the company contend be correct, it will follow that they may under section 8 of the Act lease their railway to any canal company. The 24th section of the local Act is the first that contains any provision for giving the railway company the powers of the Stratford Canal Company, under the clauses previous to that section nothing but the property could have been conveyed. That section provides for the transfer of all powers which the canal company could have "used, exercised, or enjoyed," not which it could \* have acquired. The power now sought to \* 670 be exercised is one which the canal company had not, and therefore could not have exercised, though they might by taking proper steps have acquired it.

At the close of the argument their Lordships directed the case to stand over, that it might be reargued by one counsel on each side before their Lordships, assisted by common-law Judges. The case was accordingly reargued by *Mr. Palmer* and *Mr. Sel-*

*wyn* before their Lordships, assisted by Mr. Justice ERLE, on the 22d of June. The nature of the arguments sufficiently appears from the above report of what was urged on the former occasion. Their Lordships reserved judgment.

June 29.

The Lord Justice KNIGHT BRUCE read the opinion of Mr. Justice ERLE, which was in the following terms:—

“ In this case the question is, whether a contract by the defendants to take a lease of the tolls of the Birmingham and Worcester Canal, under the 8 & 9 Vict. c. 42, § 8, is void at law.

“ The plaintiff contends that it is so, because the defendants were incorporated for the purpose of making and maintaining a railway, and that a lease of a canal is inconsistent with that purpose, and *ultra vires*, according to the class of cases ranging from the *East Anglian Railway Company v. The Eastern Counties Railway Company* (a) to *The Mayor of Norwich v. The Norfolk*

\* 671 \* *Railway Company*, (b) and because the 9 & 10 Vict. c. 278, authorizing the purchase of two canals by the railway company, confines the powers taken under the purchase to those which the canal companies might have exercised at the time of the purchase, and so excludes the power of taking a lease of the tolls of a canal, which could not have been exercised at the moment of the purchase from the want of previous formalities.

“ For the defendants it has been answered, that the railway company, incorporated by the 8 & 9 Vict. c. 184, became also a canal company by the purchase of the Stratford-upon-Avon Canal in pursuance of the 9 & 10 Vict. c. 278, and that as such canal company they had the right to adopt the powers and provisions of the 8 & 9 Vict. c. 42, and so had a right to contract for the lease in question ; and it seems to me the defendants are right.

“ The 9 & 10 Vict. c. 278 amends the Act of Incorporation passed in the previous year. All who had shares under the first Act must be taken to have consented by their representatives to the amending Act, and all who have taken shares since have expressly adopted it. The second Act, authorizing the purchase of two canals, requires the defendants to become practically a

(a) 11 C. B. 775.

(b) 4 El. & Bl. 397.

canal company; by sect. 21, the purchase is to comprise, not merely the navigation and lands and works connected therewith, but all boats, barges, stock, and implements; and by sect. 24 they take the canal subject to all the conditions in the Canal Acts relating to the maintenance and use of the canal, and of any canal communicating therewith; and by sects. 30, 31, 32, 33, they are bound to maintain the canals and reservoirs, so as to \* keep the canals open for traffic, subject to correction \* 672 by the board of trade in case of complaint, and subject to a limitation as to the maximum of their charges, and subject to penalties for giving undue preference in the use of the canal, and in case of inconvenience to the public left unremedied by themselves, subject to a remedy by bill to be introduced by the lords of the treasury; and sect. 38 declares them not exempt from any general Act relating to railways or canals amalgamated with railways.

" These provisions abundantly show that the defendants, though named a railway company, are both a railway and a canal company, and in the latter capacity bound under many securities to find canal accommodation for the public. So far from an express or implied prohibition against applying their funds to canals, the legislature has guarded against the canal being sacrificed to the railway, and if funds for both should be wanting, the obligations for keeping up the canal are more stringent than those for the railway. It is clear they became a canal company in some sense; then does the 24th section so limit their power as to exclude them from adopting the 8 & 9 Vict. c. 42? That section enacts, that when the canal is vested in the railway company, that company may exercise all the rights, powers, and privileges which the conveying company could have exercised in relation to such canal prior to the transfer thereof under any Acts of Parliament relating to such canal. It was said, that the power of adopting the 8 & 9 Vict. c. 42, did not exist in the Stratford-upon-Avon Canal Company at the time of the conveyance, because the shareholders had not resolved so to do; but, at the time of the conveyance, that canal company had the power of convening a meeting for the purpose of so adopting it, and that power passed to the railway company, \* and the resolution of the shareholders in the \* 673 railway company acting in the capacity of canal company,

if duly convened, would have the same force as the resolution of the shareholders in the former company.

"It was also said, that only the rights, powers, and privileges which the conveying company might have exercised under any Acts relating to their canal passed, and that rights to be derived from the 8 & 9 Vict. c. 42, relating to all canals, were not rights derived from an Act relating to this canal. But if the 8 & 9 Vict. c. 42, relates to all canals, it relates to this also. And if the right to become carriers by canal is made incident to the existence of a canal company, the private and local Acts creating that existence meditately create the right of becoming carriers by canal.

"The words of the statute seem to me to support the defendants' case. If the intention of the legislature is considered, it probably intended to promote the accommodation of the public and the profits of the company. The provisions of the 8 & 9 Vict. c. 42, promote the accommodation of the public by facilitating long transits without delay; they promote also the profits of canal companies by enabling them to be carriers on their own canals. The probability, therefore, is, that the defendants taking the canal with many obligations, took it also with the opportunity for profit common to all other canals, which profit can only be realized by increase of public accommodation.

"The question, whether the defendants could adopt the Act of 8 & 9 Vict. c. 42, so as to become carriers on their own canal, is the same as the question whether they could take a lease of another

\* 674      canal. The exercise of either power without skill may be a source of loss to \* the shareholders, but the contracts of companies, when the subject-matter thereof is within the power granted to them, are not void because they are so made as to yield no profit or incur great risk.

"In my opinion, the contract in question is valid at law."

The Lord Justice KNIGHT BRUCE, after reading the above opinion, proceeded as follows:—

The Court is greatly indebted to Mr. Justice ERLE for his Lordship's useful and able assistance. The legal point on which he has favoured us with his opinion appears to me to be not without difficulty, nor perhaps wholly free from doubt. My impression, however, is in accordance with his Lordship's conclusion, that what

the plaintiff seeks to prevent is not unlawful, but is within the powers of the directors of the Railway Company before us, sanctioned as their intended proceeding has been. If that is clear, the suit is plainly without foundation. But if on the legal point there is room for doubt, the circumstances do not in my judgment render it imperative on the Court to act against the company, or to retain the bill, to which the Attorney-General is not a party,—a bill certainly not filed with any view to the benefit of the company, or its shareholders, nor likely, I think, to be of advantage to them. It describes with commendable accuracy the plaintiff's official connection with the Grand Junction Canal Company, the managers of which, under the influence of motives obvious enough, but not including, I repeat, any wish to do good to the railway company or its proprietors, seem to have made him a shareholder in the railway company for the mere purpose of constituting this litigation,<sup>1</sup> of which, in my opinion, it will be beneficial to those interests that he \* pro- \* 675 fesses a desire of protecting, and be right, to dispose without more delay without dismissing the bill with costs.

THE LORD JUSTICE TURNER.—My opinion on the legal question agrees with that of Mr. Justice ERLE, and on that ground I think that the bill ought to be dismissed, and dismissed with costs.

See 21 & 22 Vict. c. 75, § 8.

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### DENTON v. LORD JOHN MANNERS.

1858. June 23, 24, 26. July 5. Before the LORDS JUSTICES.

A testator gave his residuary personal estate to "Lord J. M., or the secretary for the time being of 'The Association for buying impropriate tithes and revesting them in the Church of England,'" and directed that his debts, &c., should be payable primarily out of such property as he could not give

<sup>1</sup> See Bloxam v. Metropolitan Railway Co., L. R. 3 Ch. Ap. 337, 353; Kerr Inj. 549, 550.

to charity, and that his pure personality should be applied "to the above-mentioned charitable purpose." No society of the above name existed, but Lord J. M. was the secretary of an association called "The Tithe Redemption Trust," established for the purpose of promoting the restoration of inappropriate tithes to the Church. It was alleged that several of the modes in which this association employed its funds were such that a bequest might legally be made to it: *Held*, that assuming the association to have objects not interfered with by 9 Geo. II, c. 36, and assuming a bequest to it generally to be valid, the testator had in the present case himself pointed out the application of his money to a particular object, that this object was one for which a gift by will cannot be made, and that the bequest was void.

THIS was an appeal from a decision of the Master of the Rolls, that a certain bequest in the will of Lucius Graham Kinderley, the testator in the cause, was void under the stat. 9 Geo. 2, c. 36.

The testator by will, dated 28th March, 1848, after giving certain legacies and annuities, bequeathed the residue of his estate as follows: "And all the residue of my property and effects of what kind soever, after paying the aforesaid legacies and annuities, I give and bequeath to *Lord John Manners or the secretary for the time being of the association for buying inappropriate tithes,*\* 676 *and revesting them in the Church of England*, and I \*declare that in case at my death any part of my property is invested in real estate or railway shares, or any other security which would make a gift to a charitable use void and invalid, that such property so invested should be applied towards payment of my debts and other liabilities, and *my purely personal estate be applied to the above-mentioned charitable purpose.*"

The testator died on the 3d June, 1855, possessed of personal estate only, and a claim was filed by his executor for its administration. There did not exist any association with the title mentioned in the will, but it was found that Lord John Manners was chairman of an association called "The Tithe Redemption Trust for the Church in England and Wales."

This society was originally instituted in 1845, under the name of "The Church Endowment Society." By a prospectus published in that year, it was stated that its object was to procure the restoration of tithes to the Church, "by collecting contributions for aiding the willing-minded by compensation to give back such tithes as they may be possessed of." At a meeting at which this plan was proposed, it was resolved that at the first general meeting a committee should be chosen and rules proposed. The first gen-

eral meeting was held in June, 1846, and a committee was then appointed "to arrange the requisite preliminaries for associating a body of churchmen, whose labours should be directed to the collection of funds for aiding and encouraging owners of tithes to restore and reconvey them to the Church." In March, 1847, the committee published a statement recommending "that means should be presented to all desiring to assist in the work of restitution by the formation of a public body to be denominated 'The Tithe Restitution Trust for the Church in England and Wales.'" The \* statement proceeded to propose the constitution of a \* 677 board for the management of the affairs of the body. In the same year an amended statement to the like effect was published, the title of the body being slightly altered; and at a general meeting held in November, 1847, the amended statement was adopted, and a board of management appointed, and from that time the society bore its present title. The objects and purposes of the trust were not defined by any formal instrument, but appeared from the reports which were from time to time published by the board. The first report was adopted by the board in 1849, and printed in 1850. In a preliminary statement, after referring to the history of tithe endowments in England and Wales, the board stated that the movement had attracted a sufficient amount of support to justify their taking rooms, and "coming before the public as a Church association, having for its specific object the redemption of inappropriate tithes, and their restoration to the parishes whence they arise and from which they have been alienated, with a view to the increase of parochial clergy, and the better supervision of souls." Then followed a formal statement of the objects of the trust as follows:—

" Objects of the Trust.

" 1. To give to owners of alienated tithes an opportunity of restoring them to the spiritual purposes for which they were originally ordained, and to assist them in so doing.

" 2. To apply any tithes thus restored towards relieving the spiritual destitution of the parish or chapelry whence they arise, by adding to the endowment of such parish church or chapel, or by the endowment of new districts therein.

\* " 3. To apply to Parliament to facilitate the means of \* 678 accomplishing these objects,—1st. By rendering the mode

of the reconveyance of tithes less expensive. 2d. By enabling persons having limited interests in inappropriate tithes to reconvey them upon adequate compensation being given; and 3d. By enabling owners of inappropriate tithes to give them by will for the endowment of the church in the place whence they arise."

Then followed the rules of the association, the 7th of which was, "that no appropriation of reacquired tithes be made without the previous sanction of the bishop of the diocese in which they arise."

The association employed its funds partly in contributing money in aid of purchases of tithes on behalf of the parishes from which they issued; but to a great extent in disseminating information on the subject, and calling attention to it by means of various publications, and in paying legal expenses incident to the restoration of tithes. The board also caused application to be made to Parliament for enactments to facilitate the restoration of tithes, and procured the making of the enactment contained in 13 & 14 Vict. c. 94, § 23.

The Master of the Rolls held, that the bequest was wholly void under 9 Geo. 2, c. 36, irrespective of any question as to the nature of the particulars of which the testator's residuary estate consisted. Lord John Manners appealed. Several questions were argued at length as to the nature of the property which was the subject of the disposition; but as the Court did not pronounce any opinion upon them, they are not further noticed.

*Mr. Selwyn and Mr. Kenyon*, for the appellant.—If two  
 \* 679 charitable purposes are pointed out by a will, \* one of which  
 is forbidden by 9 Geo. 2, c. 36, but the other is not, and the  
 trustees are left at liberty by the will to apply the whole fund to  
 the legal purpose, the gift is good. *Edwards v. Hall*, (a) *Corporation of Faversham v. Ryder*, (b) *Sorresby v. Hollins*, (c) *Trye v. Corporation of Gloucester*, (d) which decides the contrary, has been overruled by *Edwards v. Hall*, and by *Philpott v. St. George's Hospital*, (e) *University of London v. Yarrow*, (g) *Church Build-*

(a) 6 De G., M. & G. 74, 89 [Am. ed. note (1)].

(b) 5 De G., M. & G. 350 [Am. ed. note (1)].

(c) 9 Mod. 221.

(e) 6 H. L. Cas. 338, 362.

(d) 14 Beav. 173.

(g) 1 De G. & J. 72.

*ing Society v. Barlow.* (a) Here it is no part of the object of the society to hold tithes, and the purchase of them is not the chief mode of applying its funds; the great object of the society is to direct public attention to the subject, and by far the larger portion of the funds has been applied in taking steps to that end. A bequest of money to be applied for these purposes is not interfered with by the statute. The gift here is general, and leaves the society at liberty to apply the bequest to any of their objects. Therefore, on the authority of the cases which have been cited, it is valid, even assuming that a bequest to be applied in the purchase of tithes in the way proposed by the society is forbidden. We submit, however, that it is not forbidden. Before the passing of 9 Geo. 2, c. 36, a devise of tithes to a curate was good. *Anon.*, (b) *Perne v. Oldfield*, (c) 6 & 7 Vict. c. 37, § 25, and 13 & 14 Vict. c. 94, § 23, restore this state of the law. Moreover, a reannexing tithes to the churches from which they were taken is not against the spirit of 9 Geo. 2, c. 36, for a great portion of the inappropriate tithes of the country is in the hands of the ecclesiastical commissioners, and so already in mortmain.

\* *Mr. R. Palmer* and *Mr. Osborne*, for the next of kin. — \* 680  
 If buying tithes had been the sole purpose of the association, the bequest would indisputably have been illegal; for a bequest to a charitable society which employs all its funds in the purchase of land cannot be supported. *Middleton v. Clitherow.* (d) It is contended that here the society had several objects, some of which are such that money may be bequeathed for them, but it must be observed that the testator gives the legacy "for the above charitable purpose," the only purpose which he had mentioned being the buying inappropriate tithes and revesting them in the church. Supposing, therefore, that the charity has several objects, still that is the object for which the testator intended his legacy, and the society has no option. But, in fact, the society has only this one object, every thing else being merely ancillary. There is no authority in support of the proposition that a society having a principal object, a bequest for which is forbidden by 9 Geo. 2, c. 36, can take a bequest on the ground that it may be applied for

(a) 3 De G., M. & G. 120 [Am. ed. note (1)].

(b) 2 Vent. 349.

(d) 3 Ves. 734.

(c) 2 Ch. Ca. 31.

subsidiary purposes. The analogy of the cases on similar questions is against such a view. *Attorney-General v. Davis*, (a) *Mather v. Scott*, (b) and the other cases mentioned in *Philpott v. St. George's Hospital*, (c) which itself is distinguished from them. The principal object here is clearly within 9 Geo. 2, c. 36. The Statute 13 & 14 Vict. c. 94, § 28, does not vary the case; for it does not contain a word which cannot be fully satisfied without affecting the former statute, and it so extends the 17 Car. 2, \* 681 c. 3, sect. 7, as to be by no means \*superfluous, though held not to interfere with 9 Geo. 2, c. 36.

*Mr. Selwyn*, in reply.

Judgment reserved.

July 5.

THE LORD JUSTICE KNIGHT BRUCE.—The first question upon this appeal seems to be as to the true meaning of the words “above-mentioned charitable purpose” contained in the will of Mr. Lucius Graham Kinderley, the testator in the cause. They must of course be read not without attention to the context, but so reading them, I am of opinion that whatever, according to any reasonably possible view of the evidence before us, may be or have been the purposes or objects of the body or society or association which he calls “The Association for buying inappropriate tithes and revesting them in the Church of England,” the words “above-mentioned charitable purpose,” as used by him, mean singly and merely the particular purpose of “buying inappropriate tithes and revesting them in the Church of England.”

The next question is, whether such a charitable gift could be effectually made by the will. It was said, that by force of several statutes passed since the reign of George 2, which were mentioned in the argument, if not independently of those statutes, it could, notwithstanding the statute of Geo. 2, commonly termed the Mortmain Act. That, however, is not my opinion: I do not read the Statute 6 & 7 Vict. c. 37, § 25, or the Statute 13 & 14

\* 682 Vict. c. 94, § 28, or any enactment on which stress was laid by *Mr. Selwyn* or *Mr. Kenyon* \* (who both argued the appeal very ably), as meaning what they contended.

(a) 9 Ves. 585. (b) 2 Keen, 172. (c) 6 H. L. Cas. 338.

The appellant's case is not in my judgment helped by the circumstance that tithes already vested in an ecclesiastical corporation, but not for the benefit of the rector, vicar, or curate of the parish where they arise, may be alienated for the benefit of that rector, vicar, or curate.

It appears to me that the disputed gift here is rendered by the Statute of Geo. 2 wholly void, and that the order under appeal made by the Master of the Rolls is right; nor am I by any means sure that my conclusion would not have been the same if I had read the words "above-mentioned charitable purpose" as importing merely "above-mentioned association," or, generally, "objects of the above-mentioned association."

THE LORD JUSTICE TURNER.—I have felt some doubts upon this case, but in the result I have come to the same conclusion as my learned brother and the Master of the Rolls have arrived at.

I am not indeed prepared to say that no legacy could be well given to this charity. It may be that there are legal purposes of this charity not merely incidental to its illegal purposes, and it may be that a gift to the charity could be supported as to its legal purposes, although it would of course fail as to its illegal purposes; but on these points I give no opinion. It is sufficient to say that in my opinion the disposition which this testator has made in favour of the charity cannot be supported. The testator has given the charity a wrong denomination, but in the denomination which he has given it he has embodied the purpose for which his gift was made. What \* is asked by the appellants is in \* 683 truth this, to substitute the real denomination of the charity for that which the testator has given, disregarding wholly the purpose embodied in the denomination which he has given, and which aptly applies to one of the purposes of the charity in its proper denomination. I think we cannot do this; but that we must take with us into the altered denomination the purpose embodied in the erroneous one, the more so from the language of the latter part of the will. I agree also in my learned brother's observations on the statutes; and think, therefore, that this appeal must stand dismissed.

## WALL v. COLSHEAD.

1858. July 6, 7. Before the LORDS JUSTICES.

A testator gave an estate to his daughter E. for life, and after her death to his executors, in trust to sell and to divide the proceeds equally between her children, their shares to be vested in them at twenty-one, with clauses of survivorship and accrue, and a direction for maintenance out of the "interest and proceeds" of their shares after E.'s decease till their shares vested. He made similar dispositions of other estates in favour of his children, A., J., and W. respectively, and their respective children. He then gave the residue of his property to E. and A., and if any of the four children should die under twenty-one, he gave the part or parts intended for them respectively to the survivors or survivor of them for life, and after the decease of such survivors or survivor he gave such part or parts to his executors, in trust to sell and to pay the proceeds to their, his, or her child or children. E. and W. attained twenty-one, and died without having had any child.

*Held*, that the trusts for sale of the estates devised to E. and W. respectively for life were absolute, and did not depend on E. and W. having children, and that the interests (see *Re Colshead, post*, p. 690) which E. and A. took in those estates under the residuary gift were personal estate.

THIS was an appeal by the plaintiff from so much of a decree of the Duchy Court of Lancaster as proceeded on the footing that a trust for sale contained in the will of P. Colshead, concerning a real estate devised for life to the plaintiff's deceased wife Ellen, had not arisen.

\* 684 \* Philip Colshead, by will dated the 10th of February, 1812, gave to his wife Mary the use of his household goods and furniture for her life, and gave her the income of all his real and personal estate for the maintenance and support of herself and his younger children, till his youngest son Johnston should attain twenty-one, and then provided an annuity for her to commence from the time when there should cease to be any child under age. The testator then devised certain freehold messuages, upon his youngest son attaining twenty-one years, to his daughter Ellen for life for her separate use, and after her death to his executors, their heirs and assigns, "upon trust that they or the survivor of them, or the heirs or assigns of such survivor, do and shall, as they, he, or she shall deem it prudent, absolutely sell the same and every part thereof, and do and shall pay the money arising from

such sale, and the rents and proceeds in the mean time, unto all and every the child or children of my said daughter Ellen, equally to be divided between and amongst them share and share alike, if more than one, the same to become vested in him, her, or them respectively on his, her, or their attaining the age of twenty-one years, and to be paid at such age to such of them as shall attain the same after the decease of my said daughter, but as to such of them as shall arrive at such age in the lifetime of my said daughter the payment of his, her, or their share or shares to be postponed till after her decease." The testator then proceeded to dispose of other messuages, in a precisely similar way in favour of his son Johnston and his children, and of other messuages in the like manner in favour of his daughter Amelia and her children. He then devised another freehold property to his son Richard for life, with remainder to his own executors in fee, upon trust for sale, expressed in the same words as the trust for sale given above, and directed the proceeds to be held in thirds upon trusts for

\* Ellen, Amelia, and Johnson, and their respective children, \* 685 in the same terms as the trusts of the proceeds of sale of the properties before devised for the benefit of them and their children. The testator then devised another property to his son William for life, with a similar trust for sale and trusts of the proceeds for his children. Then followed clauses of survivorship and accrue between the children of Ellen in the event of any of them dying before the shares intended for them should vest, and a direction that the executors should after the decease of Ellen apply the "interest and proceeds" of the share or shares of such of her children as should not have acquired a vested interest therein for and towards his, her, and their maintenance, &c. Similar clauses followed as to the children of the other tenants for life, except Richard. The testator then, after bequeathing some pecuniary and specific legacies, gave to his daughters Ellen and Amelia, in equal shares, the residue of his estate and effects; and in case any of his children William, Ellen, Amelia, and Johnson should die under twenty-one, he gave the part or parts by his will intended for him, her, or them respectively to the survivors of all his said children equally, or the survivor, if only one, during his, her, or their respective life or lives; and after the decease of such survivors or survivor, he gave such part or parts to his said executors in trust to sell the same and pay the money arising from such sale,

and the rents and proceeds in the mean time, unto their, his, or her child or children, in such proportions, at such time or times and subject to such provisos and declarations as were therein before particularly mentioned concerning the share or shares given to his said children respectively, such child or children to take only the share or shares which his, her, or their parents would have taken if living; and the testator appointed his daughter Ellen and John Rowland executors of his will.

\* 686 \* The testator made a codicil, dated the 29th of November, 1819, by which, after making certain variations in his will, which are not material to be stated, he gave his residuary property to his wife for life, and after her death equally between and amongst William, Ellen, Amelia, and Johnson, share and share alike, "precisely in the same way as the shares before given to them in my will."

The testator died on the 1st of December, 1819, leaving all the children named in his will surviving him. Johnson Colshead, the youngest child, attained twenty-one in 1822. The testator's widow died in February, 1847. Richard Colshead died in 1820, and William in 1822, intestate and without issue. Ellen died in March, 1848, without issue, and the plaintiff, her second husband, was her administrator. Amelia married Robert Lightbody, and died in 1846 a widow, leaving issue.

The Vice-Chancellor, by decree dated 14th August, 1857, declared among other things that according to the true construction of the will and codicil, the trusts for sale of the estates of which Ellen and William respectively were the first tenants for life did not arise, and that the two-fourths by the codicil given to William and Ellen for their respective lives in those estates vested absolutely in Ellen Wall and Amelia Lightbody, as the ultimate residuary devisees of the testator under his will, as tenants in common, and that their respective shares upon their death descended to their respective heirs-at-law as real estate. From these declarations and the directions consequential on them the plaintiff appealed.

*Mr. Follet and Mr. Little*, for the appellant, contended that the trust for conversion was absolute, and that the interests  
\* 687 which Ellen and Amelia took under \* the residuary clause in the estates devised to William and Ellen for life were in

the nature of personality. They referred to *Carr v. Collins*, (a) *Smith v. Claxton*, (b) *Wright v. Wright*, (c) *Taylor v. Taylor*, (d) *Mower v. Orr*, (e) *Cornick v. Pearce*, (g) *Hatfield v. Pryme*, (h) *White v. Smith*, (i) *Tily v. Smith* (k) *Doughty v. Bull*, (l) *Ashby v. Palmer*. (m)

*Mr. Bardewell* for the personal representative of Amelia Lightbody.

*Mr. Fischer*, for Johnson Colshead, the heir at law of Ellen.

I contend that the shares which Amelia and Ellen took in the property in question were real estate, on the ground that the trust to sell was only for the purpose of division between the children of William and Ellen, the tenants for life, which purpose has failed, and there is no intention expressed that there should be a sale for the purpose of division among the residuary devisees and legatees. Two circumstances are strong to show that the testator did not intend the properties to be sold in all events at the death of the tenants for life:— 1. By the clause immediately following the residuary gift in the will, if a tenant for life dies under twenty-one, his share is given over to others for their lives; thus fresh lives are put in, and it cannot have been the intention that the estate should in such a case be at once sold. 2. There are no words pointing at a sale in the case of there being \* only one child of a tenant for life. *Crabtree v. Bramble* (n) \* 688 shows that an only child would have taken the estate as reality.

[THE LORD JUSTICE KNIGHT BRUCE.— Does or does not that case turn on an election by the child to take the property as real estate? ]

- (a) 7 Jur. 165.
- (b) 4 Modd. 484.
- (c) 16 Ves. 188.
- (d) 10 Hare, 475.
- (e) 7 Hare, 473.
- (m) 1 Mer. 296; S. C., Jarman on Wills, vol. 1, p. 502 (ed. 1855).
- (n) 3 Atk. 680.

- (g) 7 Hare, 477.
- (h) 2 Coll. 204.
- (i) 15 Jur. 1096, V. C. K. B.
- (k) 1 Coll. 434.
- (l) 2 P. Wms. 320.

*Smith v. Claxton* (*a*) shows that where a sale becomes wholly unnecessary, there is no conversion; *Hill v. Cock* (*b*) shows that where a testator expresses an intention to convert only for a particular purpose, the court will not imply a further purpose; *Ashby v. Palmer* (*c*) is in my favour, when the clause supplied by Mr. Jarman is looked to. The marginal note in *Carr v. Collins* (*d*) is not warranted by the judgment, and the decision proceeded on the special circumstances of the case, not on any general principle.

*Mr. Follett*, in reply.

THE LORD JUSTICE KNIGHT BRUCE.—With deference to the Vice-Chancellor, I do not read this will as he has done. It is one of those instruments as to the effect of which it is no matter of surprise that there should be a difference of opinion. I, however, think that the trust for sale was not conditional but absolute. It is not suggested that there was on the part either of Ellen or Amelia any election, any expression of an intention or wish to take the property in any other character than that which the testator gave to it. It must, therefore, I think, be treated as having been personalty at their respective deaths. The decree should, as I conceive, be varied accordingly.

\* 689 \* THE LORD JUSTICE TURNER.—The question is, whether the testator intended a conversion out and out or a conversion only for the purpose of division between the children of the tenants for life. I confess that, with deference to the Vice-Chancellor, I have arrived at the conclusion that the testator intended an absolute conversion. I think so, because it is clear that on the death of a tenant for life leaving children, all of whom were under twenty-one, the trust for sale would arise, though the shares of the children would not be indefeasibly vested. I am strongly confirmed in this view by the clause immediately following the residuary gift in the will, for under this clause if a tenant for life died under twenty-one there was to be a sale for the benefit of other

(*a*) 4 Mad. 484.

(*b*) 1 V. & B. 173.

(*c*) 1 Mar. 296.

(*d*) 7 Jur. 165.

persons than the children of the tenant for life so dying. The testator, therefore, has shown that he did not intend to limit the conversion to the case of there being children of the tenant for life of each property, and the trust for conversion not being limited to that event, I do not see how to limit it. The shares in dispute must accordingly be treated as personal estate.

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\* *In re* The LIVERPOOL DOCK ACTS. \* 690

*In re* The TRUSTS of COLSHEAD'S WILL.

1852. June 26. Before the Vice-Chancellor TURNER.

A testator gave an estate to his daughter E. for life, and after her death upon trusts for her children, and made similar dispositions of other estates in favour of his daughter A. and his sons J. and W. respectively and their respective children, and gave his residuary estate to E. and A. equally. By a codicil he gave the residue to his wife for life, and after her death between E., A., J. and W. equally, "precisely in the same way as the shares before given to them in my will: *Held*, that the shares of the residue were not given absolutely by the codicil, but were subject to the limitations contained in the will as to the estates specifically devised."<sup>1</sup>

*Held*, also, that E. and W. having died without issue, their shares in the residue went to the personal representatives of E. and A., the absolute gift to E. & A. in the will remaining to that extent unaltered.<sup>2</sup>

THE construction of the will and codicil, to which the preceding case of *Wall v. Colshead* relates, came before the Lord Justice TURNER when Vice-Chancellor, on the occasion of the distribution of a sum of money paid into Court for a part of the testator's estate, taken under the powers of the Liverpool Dock Acts.

The judgment on that occasion was as follows:—

THE VICE-CHANCELLOR.—The first question in this case is, what is the effect of the residuary disposition contained in the codicil? It cannot, I think, be doubted that the disposition gave to each of the four children who are named, some interest in an

<sup>1</sup> See 1 Jarman Wills (3d Eng. ed.), 162.

<sup>2</sup> See 1 Jarman Wills (3d Eng. ed.), 710, 711, in note.

equal fourth part of the residue, and the question is therefore narrowed to this: was it the intention of the testator that each of them should take an absolute interest in the one-fourth of the residue, or was it his intention either that the fourths given to the daughters should go to them absolutely, and the fourths given to

the sons follow the dispositions of the particular estates  
\* 691 given to them for life with remainders to their children,\* or

that both the fourths given to the daughters and the fourths given to the sons should follow the dispositions of the particular estates? Upon the best consideration which I have been able to give this case, I think that the testator's intention was, that all the fourths should follow the dispositions of the particular estates. The testator gives the shares to the four "precisely in the same way as the shares before given them in his will." He must have intended, therefore, to refer to property in which shares had been given to all of them, but no shares of residue had been given to William and Johnson. The testator had not by his will given either to William or to Johnson any share of the residue, nor given to either of them any part of his property absolutely, nor made any disposition in favour of either of them, except as to the particular estates. He could not, therefore, I think, intend that they should take their shares absolutely, or otherwise than according to the limitations of the particular estates; and this being his intention as to his sons, I think he must have had the same intention as to his daughters, both sons and daughters being included in the same clause. This construction, I think, is much aided by the circumstance that the superadded words "precisely," &c., are words of qualification upon a gift which, if those words had not been added, would have been clearly absolute. It was argued against this construction, that the introduction to the clause speaks of division amongst the children, and that the clause imports absolute interest in them, but I think the testator, when he speaks of children in the introductory clause, speaks of them as representing their families as he had done in his will in the case of the gift over in the event of any dying under twenty-one, where, it is material to observe, he uses the word "shares;" and with respect to the clause importing absolute interests in the children, it is part

only of an entire sentence.

\* 692 \* The question remains, who are entitled to the shares of William and Ellen, who died without issue? I am of opin-

ion that these shares belong to the personal representatives of Ellen and Amelia, the disposition of the residue in their favour by the will remaining to this extent unaltered. If the gift to Ellen and Amelia by the will had been of a particular estate, and not of the residue, and then the gift by the codicil had been to them for their lives, with remainders to their children at the age of twenty-one, the authorities I think show that the absolute gift to them by the will would have taken effect in the event of their having no children. The circumstances of the dispositions by the codicil extending to William and Johnson, and their children, cannot, I think, alter the case, and the fact of the gift being of the residue, and not of a particular estate, is, I think, more strong in favour of the construction, for in residuary dispositions the Court leans against intestacy. It is also a circumstance in favour of this view, that, although the testator throughout the codicil has used words of revocation with reference to the particular estates, he has not in the codicil used any such words with reference to the disposition of the residue.

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1858. July 9, 10. Before the LORDS JUSTICES.

Property specifically bequeathed is not discharged from its liability to the testator's debts by the circumstances that there has come to the hands of the executor personal property of the testator not specifically bequeathed more than sufficient to pay his debts and funeral and testamentary expenses, and that the specifically bequeathed property has been made over by the executor to the specific legatee.

An executor assigned a leasehold to a person to whom it was specifically bequeathed, and allowed the residuary legatee to take possession of the rest of the property, including another leasehold. After this the rent of the second leasehold fell into arrear, and the landlord, being unable to obtain payment from the residuary legatee, filed a bill for administration of the testator's estate: *Held*, that he was entitled to have the arrears paid in full out of the specifically bequeathed leasehold, whatever the rights of the specific legatee might be as against the executor or the residuary legatee.<sup>1</sup>

The rule applied in *Gillespie v. Alexander* (3 Russ. 130) is not applicable where the estate has not been administered by the Court.

<sup>1</sup> See *Ridgway v. Newstead*, 3 De G., F. & J. 474, 482, 483.

THIS case came before the Court on two appeals from an order of the Vice-Chancellor STUART, the main question being, whether a creditor of the testator could claim payment out of a specifically bequeathed leasehold, without regard to the question whether the residuary estate of the testator was at his death sufficient for payment of debts.

Henry Rimell, the testator in the cause, was entitled to a leasehold house in Bond Street for the residue of a term of twenty-five years, the plaintiff being the immediate reversioner. He was also entitled to a leasehold property in Bruton Street.

The testator by his will, dated the 8th of January, 1841, bequeathed the Bond Street property and all other his leaseholds except the Bruton Street leasehold, and all other his personal estate, to his executors, T. Nicolson and T. W. Willett, upon trust thereout to pay his debts and funeral and testamentary expenses, and after full payment of the same and a full release and indemnity given or received to the satisfaction of his said trustees and executors, or the survivor of them, his executors or

\* 694 \* administrators, the testator directed that the Bond Street leasehold and the residuary personal estate should be made over to his son John Rimell. The testator then bequeathed the Bruton Street leasehold to his executors in trust to receive the rents, provide thereout for the maintenance of his son Frederick Rimell till he attained twenty-one, and accumulate the residue of such rents, and make over the leasehold and the accumulations to Frederick Rimell on his attaining twenty-one.

The testator died in 1844. The defendant Nicolson proved the will, paid the testator's debts and funeral and testamentary expenses, and then allowed John Rimell to take possession of the Bond Street leasehold and to deal as he pleased with the residuary estate, consisting chiefly of book debts and stock in trade. At the testator's death Frederick Rimell was in his eighteenth year, and when he came of age the executor assigned to him the Bruton Street leasehold.

John Rimell some years after his being let into possession of the Bond Street leasehold allowed the rent to fall into arrear, and the plaintiff, being unable to recover any thing from him, brought an action against Nicolson and obtained judgment. In January, 1856, Nicolson paid 150*l.* in respect of this judgment. The plaintiff subsequently brought other actions against Nicolson for arrears

of rent and breach of covenants, and obtained judgments upon which writs of *fieri facias* were issued ; but the sheriff returned *nulla bona*. The plaintiff thereupon filed his bill for the administration of the personal estate of the testator, asking to have the Bruton Street leasehold applied as part of such personal estate in satisfaction of his demand.

The cause came on to be heard before Vice-Chancellor \* STUART, who made the usual decree for administration, \* 695 with a special inquiry, whether having regard to the state of the testator's assets, the Bruton Street leasehold ought to bear the whole or any and what part of the debts due to the plaintiff and the other creditors (if any) of the testator.

The chief clerk certified to the effect that there was 737*l.* 15*s.* 4*d.* due to the plaintiff, that 150*l.* was due to Nicolson on the balance of his receipts and payments, that no part of the testator's estate was outstanding, and that the Bruton Street leasehold ought to bear the whole of the debt due to the plaintiff.

The payments allowed to the executor did not include any payments to the residuary legatee ; but it was alleged by Frederick Rimell that a considerable amount of book debts, which might have been recovered to an extent more than sufficient to satisfy the plaintiff's demand, had been left outstanding, and he applied to vary the chief clerk's certificate, contending that as at the testator's death the residuary personality was sufficient to pay his debts, the specifically bequeathed personality was not liable.

The cause came before Vice-Chancellor STUART for further consideration, and on the application to vary the certificate ; and on the 2d of March, 1858, his Honor made the following order : —

“ Declare that the leasehold estate specifically bequeathed by H. Rimell the testator, &c., to the defendant F. Rimell is not liable to the debt certified to be due to the plaintiff, unless it shall appear that the other personal estate of the testator of which he was possessed or to which he was entitled at his death is insufficient for \* payment of what has been certified to be due to the \* 696 plaintiff as well as what was due to the other creditors of the said testator.” The order then directed the certificate to be varied by striking out the 5th paragraph, which certified that the Bruton Street leasehold ought to bear the whole of the debt due to the plaintiff ; “ and the Court, having regard to the matters stated

in the affidavit of the defendant T. Nicolson, and in the two affidavits of G. Waller, filed respectively on, &c., and the plaintiff by his bill not alleging that the personal estate of the said testator, given and bequeathed by his will to the defendant T. Nicolson, was insufficient for payment of the debt certified to be due to the plaintiff as well as for payment of the other debts of the said testator, this Court doth declare that the plaintiff is not entitled to resort to the leasehold estate bequeathed to the said defendant F. Rimell for payment of his debt. And it is ordered that all further proceedings in this cause be stayed against the defendant F. Rimell, and that the plaintiff do pay to the said defendant F. Rimell his costs of this suit to be taxed, &c. And the plaintiff not seeking further relief in this suit against the other defendants, it is ordered, that all further proceedings in this cause be stayed." Liberty to apply.

The plaintiff appealed from the order on further consideration, and on the application to vary the certificate. The defendant Nicolson did not complain of the certificate, but appealed against the order on further consideration, contending that it ought to have provided for payment of the balance found due to him.

*Mr. Bacon* and *Mr. J. H. Taylor*, for the plaintiff.—We submit that the decree is clearly wrong, for that the parties \* 697 claiming under a will cannot by any arrangement among themselves exempt any part of the assets from its liability to debts. We contend that every part of the assets must remain liable to the testator's debts until it has been aliened for value, or the debts paid or barred. That an executor has paid or delivered to a legatee what is bequeathed to him does not exempt the bequeathed property from the claims of creditors, but the legatee must refund. *Gillespie v. Alexander*, (a) *March v. Russell*. (b) The plaintiff here has used all diligence to recover payment from the executor, and has been unable to do so. The result of the Vice-Chancellor's decree is, in substance, that a creditor whose demand is undisputed has had his bill dismissed with costs while there are assets remaining in specie which have not been aliened for value.

(a) 3 Russ. 180.

(b) 3 M. & C. 31.

*Mr. Malins* and *Mr. H. Waller*, for the executor.—The executor is a creditor for the sum of 150*l.* paid by him to the plaintiff in the first action. The executor duly applied all the personal estate which he got in; not a single item in his discharge consists of any thing paid or delivered to the legatees. F. Rimell cannot have any case against him, unless on the footing of wilful neglect and default; there is in reality no pretence for that, but the point cannot be tried in this suit; if F. Rimell wishes to raise it he must do so in a separate suit. In this suit the executor having been found a creditor must be treated as one, and his debt, as well as the plaintiff's, must be paid out of the Bruton Street leasehold, which can be followed into the hands of the legatee. Williams on Executors, (a) *Anon.*, (b) *Ewer v. Corbet*, (c) *Davis v. Davis*. (d)

\* *Mr. Elmsley* and *Mr. H. Stevens*, for F. Rimell.—We \* 698 contend that a creditor coming to a Court of Equity cannot disregard all rules as to primary and secondary liability, and arbitrarily claim to be paid out of whichever part of the assets he pleases. We contend that here the executor is the person primarily liable to pay, and that his liability must be exhausted before the creditor resorts to the personality specifically bequeathed, and to the bequest of which the executor has assented. Though he has assented, his liability to creditors remains: *Spode v. Smith*; (e) and where he has handed over legacies with notice of the claims of creditors, he is, as between him and the legatees so paid, primarily liable to the debts. *Orr v. Kaines*. (g)

Again, *Gillespie v. Alexander* (h) shows that where legatees are called upon to refund in favour of a creditor, each is not liable to refund to the extent of the whole of his legacy in default of any refunding by the others, but is only liable to pay his proportion of the debt; and the same principle was applied in *Greig v. Somerville*. (i) On this principle a specific legatee can only be liable for so much of the debts as the property not specifically bequeathed is insufficient to pay, and if such property was sufficient to pay them in full, he is not liable at all.

(a) Pages 1155, 1245, 4th ed.

(e) 3 Russ. 511.

(b) 1 Atk. 491.

(g) 2 Ves. Sr. 193.

(c) 2 P. Wms. 148.

(h) 3 Russ. 511.

(d) 8 Vin. Abr. Devise, Q. d. pl. 35.

(i) 1 Russ. & My. 338.

\**Mr. W. Forster*, for John Rimell.

*Mr. Bacon*, in reply.—*Gillespie v. Alexander* was a case in which the estate had been administered under the direction of the Court, and the creditor, who was in default for not coming in sooner, and was not at liberty to sue at law, was obliged \* 699 \* to submit to equitable terms. The decision in that case has no application where the estate has not been administered by the Court; and in *March v. Russell*, where the estate had not been administered by the Court, the principle of *Gillespie v. Alexander* was not applied.

THE LORD JUSTICE KNIGHT BRUCE.—The mere circumstance that the personal estate of the testator not specifically bequeathed was more than sufficient to pay all his debts and funeral and testamentary expenses and discharge all his liabilities is not, even with the additional fact that the personality specifically bequeathed has in consequence been assigned and delivered to the specific legatee, sufficient to discharge the specifically bequeathed property from the demands of the testator's creditors. In the absence, therefore, of any special circumstance affecting the general right of the plaintiff as a creditor of the testator in this cause, he would have and has a right to resort to the specifically bequeathed property which was assigned and delivered to the defendant F. Rimell, whatever the rights may be as between that gentleman and the executor, or as between that gentleman and the residuary legatee.

It is said, however, that the rule applied in *Gillespie v. Alexander*, (a) and afterwards in *Greig v. Somerville*, (b) ought to be applied here. It is said that personality applicable in the first place to the payment of this debt has been parted with, and that the specific legatee therefore ought to be charged with part only or with none of the debt according to the amount of the property.

On the accounts, however, no such fact appears; for, as I \* 700 \* understand, they do not show in discharge of the executor any payment or delivery by the executor to the residuary legatee; and the decree directs no inquiry as to wilful neglect or default. We cannot, therefore, enter into the consideration of

(a) 8 Russ. 180.

(b) 1 Russ. & My. 338.

the question whether the executor in an improper or imprudent manner stood by and allowed the residuary legatee to receive part of the residue before the debts were paid. But suppose it to be proved that the executor did so, still the act was not done under the authority of the Court, but was done without judicial intervention, and as a private act in the course of a private administration of the estate: it therefore does not bring the case within the principle of *Gillespie v. Alexander*, but leaves the creditor at liberty to exercise his rights as against the specifically bequeathed property. What the rights may be as between the specific legatee and the executor, or as between the specific legatee and the residuary legatee, is a matter with which at present we have nothing to do; we are only dealing with the rights of the creditor, and I think that nothing has occurred to take away his title to follow the assets.

THE LORD JUSTICE TURNER.—This case comes before us on two appeals from an order of the Vice-Chancellor, made on further consideration in a suit, instituted by a creditor for the administration of the estate of Henry Rimell, the testator in the cause. It appears that the testator was possessed of a leasehold in Bond Street, and of another leasehold in Bruton Street. By his will he subjected his Bond Street leasehold and his general personal estate to the payment of his debts, and subject thereto, bequeathed them in trust for his son John: he then specifically bequeathed \* the Bruton Street leasehold to his son Frederick. John entered into possession of the Bond Street leasehold, and allowed the rent to fall into arrear. The bill was filed by the landlord to recover these arrears out of the testator's estate, and a decree was made for the administration of that estate with this special inquiry: [His Lordship read the inquiry.] That decree is not now under appeal; had it been so, I should have greatly doubted the propriety of directing such a special inquiry. The ordinary forms of decree are adapted to work out the rights of the parties, and are well understood: to introduce special inquiries where they are not necessary only produces uncertainty. [His Lordship then stated the material parts of the subsequent proceedings, and continued as follows:]

The first declaration in the order under appeal amounts to this, that personal estate specifically bequeathed is not liable to the tes-

tator's debts unless there is a deficiency in the personal estate not specifically bequeathed. I do not so understand the law. The law fixes on the whole of the personal estate a liability to the debts, and whatever may be the order which this Court observes in applying the personal estate, it does not alter the legal rights of the creditor. The common forms of decree show this, for in a creditors' suit the account is not confined to personal estate not specifically bequeathed, but extends to all the personal estate come to the hands of the executor. I am of opinion, therefore, that the first declaration in the order now under appeal is erroneous. The second declaration stands on the same footing, and both these declarations, with the directions consequent upon them, must therefore be struck out.

The question then is, what ought to be done as to the payment of the plaintiff's debt. What is to be done as to the payment of debts must depend in every case upon the circumstances appearing on the certificate with which the Court has to deal. It may find a large balance due from the executor, the Court then may order payment by him personally. It may show that a balance is due to the executor, and the Court cannot then take the same course. Is, then, the creditor in this latter case to remain unpaid, though there are assets? That cannot be; there must, therefore, in such a case, be a decree against the assets, i.e., in this case against the Bruton Street leasehold.

It was contended, on the authority of *Gillespie v. Alexander* and *Greig v. Somerville*, that a specific legatee is only liable to contribution, and the argument was pushed to this length, that there cannot be any decree against him if the personal estate primarily liable to debts was sufficient to pay them. But do those cases apply to such a case as this? I think not. In those cases the creditor was in default for not having come in under the decree, and not only so, but the Court had distributed the assets, and the creditor could not impugn what had been done, except by coming to the Court and submitting to such equitable terms as the Court might think fit to impose. The terms which the Court thought it right to impose were, that the creditor should recover from each party that sum only, which, as between himself and the other persons interested in the estate, that party was liable to pay. The distinction is this, in those cases the creditor was by the previous acts of the Court driven into a position which put him under its

powers, and justified equitable terms being imposed upon him : here, the Court has only to deal with the legal rights of the creditor.

An order was made to the following effect : —

Reverse \* the order of 2d March, 1858. Costs paid under \* 703 that order to be repaid, and the deposits to be repaid to the appellants.

Declare without prejudice to any question between the defendants, or either of them, that the Bruton Street leasehold is liable to pay the debt due from the testator's estate to the plaintiff.

Tax costs of plaintiff and Nicolson, including their costs of the appeals. The costs of Nicolson as between solicitor and client.

Compute subsequent interest on plaintiff's debt.

Order a sufficient sum to pay the costs, the plaintiff's debt, and the balance certified due to Nicolson, to be raised by sale or mortgage of the Bruton Street leasehold.

Declare that the money to arise by such sale or mortgage ought to be applied in payment of what shall appear to be due to the plaintiff for principal and interest and costs, and to defendant Nicolson for his balance and costs as aforesaid.

Money to be paid into Court. Order payment thereout of debt and interest to the plaintiff, and costs to his solicitor.

Defendant F. Rimell undertaking within one month to file a bill against T. Nicolson to establish his right to be repaid what shall be so raised by sale or mortgage of the Bruton Street leasehold, order that service of the bill on Nicolson's solicitor be good service, he undertaking to accept such service.

\* Out of the money to be raised carry over 150l., and \* 704 the amount of Nicolson's costs to an account, "The account of the balance and costs due to defendant T. Nicolson," subject to the further order of the Court. No part of such amount to be paid out without notice to F. Rimell.

Adjourn further consideration for hearing before the Vice-Chancellor.

## WHITLEY v. LOWE.

1858. April 22, 23. June 6, 7, 8. July 12. Before the LORDS JUSTICES.

O., L., & H. carried on business as copartners under articles containing a covenant by which the partnership effects were made a security for the repayment of the sum in which the concern might be indebted to any partner, and the other partners covenanted to make up the deficiency according to their equitable liability. After the deaths of O. and L. their respective personal representatives filed a bill against H. to take the account of the partnership, and a receiver was appointed, who got in the assets, and, without the sanction of the Court, but with the approbation of the parties, paid them to the executors of O., to whom the partnership was largely indebted, and the suit was not further prosecuted. These payments were insufficient to discharge the debt due to O.'s estate, and the estate of L. remained liable to the estate of O. to a considerable amount in respect of that debt: *Held*, that it not being proved that the receiver made the payments with the sanction of the personal representative of L. for the purpose of discharging the liability of L.'s estate, those payments did not take the demand against L.'s estate out of the Statute of Limitations.<sup>1</sup>

THIS was an appeal by the plaintiffs from a decree of the Master of the Rolls, dismissing their bill. The facts of the case, which involved two principal points, were very complicated, but a short outline of them is sufficient for the understanding of the only point calling for a report.

The plaintiffs were the executors of George Orred, formerly a solicitor at Liverpool, who in 1820 had entered into partnership with James Lowe. This partnership terminated in December in that year. In the month of November preceding its termination an agreement under seal was entered into for a new partnership between Orred, Lowe, and William Hurry. This agreement contained among others the following covenants: —

“That if the parties or any of them shall permit their or his share of gains or any part thereof to remain in and for the use of the concern, they or he respectively shall thereon, and the said George Orred shall also upon such amount as he may in any one

<sup>1</sup> See Coope v. Cresswell, L. R. 2 Ch. Ap. 112, 123, 124.

year advance by way of capital beyond the sum of 2000*l.*, be entitled to and shall receive interest at the rate of 5*l.* per cent per annum, for so long as the concern shall have the use and benefit of such gains and advances respectively ; and that the capital, funds, and effects of the concern shall be a security for the same, or if insufficient, the other partners or partner shall from their or his own separate estate make good their or his proportions or proportion of the same as far as in equity they or he ought to be chargeable."

The other covenant was :—

" That within six months after the end or other sooner determination of the said copartnership, or after the death of either of the said parties during the continuance thereof, the said parties or their representatives shall meet together and state, settle, and adjust a final account in writing of and concerning the said joint funds, outstanding debts, receipts, and payments, and of all other the copartnership transactions, and thereupon, or as soon as can possibly be done in the former events, distribution and division shall be made of the partnership funds and effects ; and in the latter event, the surviving partners or partner shall forthwith pay or secure to be paid to the representatives of the deceased the share of such deceased partner of and in the partnership \* funds and effects, and shall continue to carry on the business in manner hereinbefore provided."

The new partnership was carried on under the above articles. In December, 1828, Orred died. Hurry withdrew from the business at or before the time of Orred's death, having, as it appeared, drawn out the full amount, or more than the full amount, of what he was entitled to. After Orred's death Lowe carried on the business alone and died in 1834, leaving the defendant Elizabeth Lowe his widow, and three infant children. Mrs. Lowe took out letters of administration to his estate.

Shortly after James Lowe's death, his administratrix and the executors of Orred filed a bill against William Hurry for the purpose of taking the accounts of the partnership. On 12th June, 1834, an order was made in that suit of *Whitley v. Hurry*, appointing William Dalrymple receiver, to get in the debts due to the

partnership, and restraining William Hurry from intermeddling with the partnership property. The order contained only the usual directions, including directions for the receiver to pass his accounts and to pay his balances into Court to the credit of the cause. The receiver, as it appeared, never passed any accounts nor paid any money into Court, but he collected the partnership debts, and paid them to the executors of Orred on account of what was due to Orred's estate in respect of the partnership. These payments, however, were insufficient to meet the amount due to the estate, and the estate of James Lowe remained indebted to Orred's estate in respect of the partnership. The last of these payments were made in the year 1845, by the end of which year all the debts which were recoverable appeared to have been got in. It was alleged by the plaintiffs in the present

suit, that Mr. Dalrymple, who, as it appeared, was employed \* 707 by \* and much trusted by Mrs. Lowe, made these payments with her knowledge and sanction, and as her agent, for the purpose of discharging in part the debt due to the plaintiffs from Mr. Lowe's estate; but the Court did not consider that the evidence adduced on their part established this. No further proceedings were taken in the suit after the order appointing the receiver.

Shortly after 1845 it appeared that the sum of 1947*l.* 7*s.* 6*d.* was due from Mr. North, who had become the purchaser of the business, to Mrs. Lowe for the arrears of an annuity which he had bound himself to pay to her, and it was proposed that Mr. North should appropriate to this demand part of a mortgage debt of 2300*l.* due to him from a Mr. Alletson. A further arrangement was also proposed, that Mrs. Lowe should appropriate the interest thus given her in the 2300*l.* mortgage to the payment of the amount which was considered to be due from James Lowe's estate to Orred's estate in respect of the partnership. The Court, however, did not consider it established in evidence that Mrs. Lowe had any knowledge of or sanctioned this latter arrangement.

In the year 1855, Mrs. Lowe filed her bill against Mr. North to establish her title to the 1947*l.* 7*s.* 6*d.*, part of Alletson's mortgage money, and to obtain a general account from Mr. North, whom she alleged to have been her agent. Mr. North, by his answer, denied the agency, and stated a claim of the executors of Orred to the 1947*l.* 7*s.* 6*d.*, and submitted that they ought to be

made parties to the suit. They were not made parties to it, and in the year 1857 they filed the present bill, in which they claimed alternatively either to be entitled to the 1947*l. 7s. 6d.* under the suggested arrangement, or to have the amount due to \* Orred's estate on the partnership account paid out of the \* 708 estate of James Lowe.

The Master of the Rolls held, that the lien on the 1947*l. 7s. 6d.* was not established in evidence, and that the payments made by the receiver in 1845 did not take the general demand against Lowe's assets out of the Statute of Limitations. His Honor accordingly dismissed the bill, and from that decision the present appeal was brought.

*Mr. Selwyn* and *Mr. Kay*, for the plaintiffs, in support of the appeal.

*Mr. R. Palmer, Mr. Follett, and Mr. Webb*, for Mrs. Lowe.

*Mr. Kay*, in reply.

July 12.

THE LORD JUSTICE KNIGHT BRUCE.—This appeal is against the dismissal at the Rolls on the merits of a bill filed in the year 1857, by Messrs. Whitley and Lace, as the surviving executors of Mr. George Orred, who died in the year 1828, and had for some years before, and at the time of his death, carried on business as a solicitor at Liverpool, in partnership with Mr. James Lowe. When Mr. Orred died, a considerable sum of money was due to him from the partnership and from Mr. Lowe in respect of the partnership. There was for some time before, and perhaps at the time of Mr. Orred's death, a third member of the firm, namely, Mr. William Hurry. The object of the suit is to recover for Mr. Orred's estate against the defendant Mrs. Elizabeth Lowe, the administratrix of \* James Lowe, payment or satisfaction, total or \* 709 partial, of so much as remains unsatisfied of the debt that I have mentioned.

Mr. Lowe and Mr. Hurry did not, after Mr. Orred's death, enter into or continue in partnership together. Each of those two gentlemen, from the time of that event, carried on business as a solicitor separately. Mr. Lowe died in the year 1834, and was survived

by Mr. Hurry, who probably died also before the commencement of this cause. He is not nor has been represented in the suit, a circumstance that seems not important.

The first question is, whether, in respect of the debt to Mr. Orred's estate, Mrs. Lowe, by herself or any agent authorized by her for the purpose, made or entered into or sanctioned the arrangement or agreement alleged in the 52d paragraph of the bill, and mentioned again in some of its subsequent paragraphs, or any such or any similar agreement or arrangement, concerning the sum of 1947*l.* 7*s.* 6*d.*, to which the bill particularly and frequently refers. This question, as to which the burden of proof is on the plaintiffs, has seemed and still seems to me one of some difficulty; but I am unable, upon consideration of the whole materials before us (including of course what Mrs. Lowe herself states), to represent myself as satisfied that the evidence establishes the affirmative of the proposition. What might have been effected by the testimony of Mr. Dalrymple, also mentioned in the bill, a gentleman much in the confidence of Mrs. Lowe, if he had been a witness in the cause, it is impossible to say. He died in the year 1853.

The next question is, whether the plaintiffs' claim is,  
\* 710 \* as Mrs. Lowe insists, barred by lapse of time. If it is one merely upon simple contract, it certainly is so, there having clearly been neither payment nor written acknowledgment on the part of Mrs. Lowe in or since the year 1846. It is contended, however, to be, by virtue of a deed dated the 30th of November, 1820, executed by Messrs. Orred, Lowe & Hurry, which constituted or regulated their partnership a specialty debt. Mrs. Lowe, denying this, asserts that, on the assumption of the fact being so, the demand is barred by the Statute of 3 & 4 Will. 4, c. 42, a bar contended by the plaintiffs not to have taken place, their reason being that certain payments made by Mr. Dalrymple to them before and in the year 1845, were, as they say, made by the authority or with the sanction of Mrs. Lowe, on account and towards satisfaction of the debt in dispute due to the estate of Mr. Orred. This Mrs. Lowe also denies. It appears that Mr. Dalrymple had, in a cause of *Whitley v. Hurry*, instituted in this Court by the present plaintiffs and Mrs. Lowe against Mr. Hurry after Mr. Lowe's death, been by an order dated the 12th of June, 1834, appointed receiver of the outstanding debts due to the part-

nership of Orred, Lowe & Hurry. The order was in these terms: [His Lordship here read the order.] That cause seems not to have proceeded beyond the order that I have just read. Under it, Mr. Dalrymple seems to have passed no account, but collected various sums, which, at various times in and before the year 1845, he paid to Mr. Orred's executors, these being the payments on which they rely as excluding the operation of the statute of Will. IV. Nothing seems to have been received after that year, nor was any thing in or before or after the year 1845 paid into Court. It is said, I repeat, on the part of Messrs. Whitley & Lace, that Mr. Dalrymple (the receiver), who was in the employment of Mr. North, the solicitor of the plaintiffs in \* *Whitley v. Hurry*, and greatly trusted by Mrs. Lowe, made these payments with her knowledge and sanction, for the specific purpose of discharging in part the debt due to the executors from Mr. Lowe's estate, a proposition which it is of course on the executors to prove. But upon an attentive examination of the evidence, though this part of the case also strikes my mind as not free from difficulty, it does not appear to me that they have done so as to any one of the payments, nor is there, in my opinion, any likelihood that their position would be improved or assisted by further investigation. It seems to me that, as far as Mrs. Lowe is concerned, we must take the payments to have been irregularly made to the executors, but made to them merely as the executors of a partner in the firm of Orred, Lowe & Hurry, or as plaintiffs in the cause of *Whitley v. Hurry*, and not to have been made in recognition of a debt from the estate of James Lowe, and that therefore the appeal cannot succeed; but it should, I think, be dismissed without costs.

The Lord Justice TURNER, after stating the material facts, and giving at length his reasons for holding that the plaintiffs' case failed as to the specific lien claimed on the 1947*l. 7s. 6d.*, proceeded as follows:—

There remains, then, the question as to the claim against the general assets of James Lowe. This question depends wholly upon the Statute of Limitations. If the debt be a simple contract debt, there can be no doubt that it is barred. If it be a specialty debt, it can only be so under the covenants in the partnership articles. Two covenants in those articles were relied on as con-

stituting this debt a specialty: [His Lordship read the covenants given above.] The latter of these covenants may, I think, \* 712 be laid out of the case. It seems to me to apply \*only to the share of the partnership funds and effects ascertained upon the adjustment of the final account, and no such account was ever adjusted. It is by the first covenant, therefore, if at all, this debt must be constituted a specialty, and I am disposed to think that there is a specialty debt on this particular covenant. There has not, however, been any acknowledgment of any debt due upon this covenant for upwards of twenty years, unless the payments made by Dalrymple can be considered to amount to such an acknowledgment, and, by the Statute of Limitations applicable to specialty debts, there must be not merely a payment, but an acknowledgment by payment in order to take a case out of the statute.<sup>1</sup> The question then is, whether Dalrymple's payments can be considered as an acknowledgment of a debt due upon this covenant, and I am of opinion that they cannot. I think they must be referred, not to the covenant for payment of the deficiency, but to the obligation attaching upon him in respect of the partnership assets which he received, more especially as this very clause in the articles make those assets a security for what was due. I think, therefore, that this claim of the plaintiffs also fails, and that this appeal must accordingly be dismissed, but it is much too doubtful a case to dismiss it with costs. There must be no costs of the appeal.

1858. July 18, 14. Before the LORDS JUSTICES.

R. mortgaged an estate in 1832 to four persons who were known by R. to lend the money as trustees for the K. Company. In 1841 R. mortgaged the same property to S. & Co., who had notice of the K. Company's mortgage, but did not give the company notice of their security. In 1856 R. joined as surety for N. in a security to other persons, who, as trustees for the K. Company, advanced money to N. This security comprised real estate of N. and a policy of assurance belonging to R., who knew that the security was taken on

<sup>1</sup> See Angell Limitations, § 240 and notes.

behalf of the company: *Held*, that S. & Co. could not redeem the property comprised in the first mortgage without also redeeming that comprised in the mortgage of 1856.<sup>1</sup>

THIS was a special case heard before the Lords Justices in the first instance, Vice-Chancellor Wood, in whose Court it had been set down, having declined to hear it on the ground of personal interest.

By indenture dated 18th August, 1832, William Randall mortgaged freehold and leasehold property to D. J. Parker, Richard Smith, B. Wise, and Samuel Baker, to secure 1700*l.* expressed to be advanced by them out of moneys belonging to them on a joint account, as is usual in mortgages to trustees. Nothing appeared on the face of the deed to show that the lenders were trustees, but it was known to Randall that they advanced the money as trustees for the Kent Fire Insurance Company.

On 18th January, 1841, Randall mortgaged the same property to the defendants Seager & Co. for 1500*l.*, and on 29th November, 1847, gave them a further charge upon it for 1063*l.* and further advances. It was not distinctly stated in the case, but in answer to a question by the Court it was admitted at the bar, that at the time of taking these mortgages, Seager & Co. knew of the prior mortgage of 1832. They did not, however, give any notice of their security to the prior mortgagees.

On 28th April, 1856, William Newman and William Randall conveyed and assigned to the plaintiffs certain freehold and other property belonging to Newman, and a policy of assurance belonging to Randall by way of mortgage to secure 2000*l.* advanced by the plaintiffs to Newman. It appeared, on the face of the deed, that Randall joined in it only as a surety for Newman. The plaintiffs advanced this sum as trustees for the Kent Fire Insurance Company. It did not appear that at this time the company had any notice of the mortgages of 1841 and 1847.

At this time all the mortgagees named in the deed of 1832 were dead, and that mortgage was vested in the defendant C. A. Smith, the personal representative and devisee of Richard Smith, who was

<sup>1</sup> See 1 Sugden V. & P. (8th Am. ed.) 196; 2 Dart V. & P. (4th Eng. ed.) 533; Watts v. Symes, 1 De G., M. & G. 240, and cases in note (2); Vint v. Padget, *ante*, 611, note (1); 1 Lead. Cas. in Eq. (3d Am. ed.) 594, and notes to Marsh v. Lee.

the survivor of them, and it remained so vested, but in trust for the company, at the time of the hearing.

In July, 1857, Randall became bankrupt.

Under an arrangement among all parties interested, the properties comprised in the several securities were sold without prejudice to the rights of the parties. The property comprised in the mortgage of 1832 realized considerably more than what was due on that security, but the sale of the property comprised in the mortgage of 1856 brought in considerably less than what was due on that mortgage, and the plaintiffs, on behalf of the Kent Fire Insurance Company, claimed to be paid the deficiency out of the surplus proceeds of the sale of the property comprised in the mortgage of 1832, in priority to the claim of Seager & Co.

*The Solicitor-General* and *Mr. A. E. Miller*, for the plaintiffs, contended that the right to tack was, upon the authorities, quite clear.

\* 715     \* *Mr. Bardswell*, for the defendant Smith, the representative of the surviving trustee of 1832, took no part in the discussion.

*Mr. Daniel* and *Mr. L. Mackeson*, for Seager & Co. — There is no case deciding that mortgages can be tacked in the way now contended for, merely because the same persons are equitably interested therein, the legal interest being vested in different persons. The principle is, that the mortgagee claiming to tack has legal rights which he may insist ought not to be taken from him, except on the terms of paying what is due on both his securities. *Vint v. Padget* (a) carries tacking as far as any case, but it does not support the plaintiffs' claim. In that case the second mortgagee knew that the two first mortgages existed, and might coalesce: not so here. When Seager & Co. advanced their money, only the mortgage of 1832 was existing. When they advanced it they had a right to redeem on payment of that mortgage alone; that equity dates from 1841, and is prior to the equity of the plaintiffs. The observations of Lord ALVANLEY in *Jones v. Smith* (b) are in our favour.

(a) *Supra*, p. 611.

(b) 2 *Ves. Jr.* 372, 376.

[THE LORD JUSTICE TURNER. — The fire office, when dealing with Randall in 1856, must be supposed to have dealt with him on the footing of the law as to tacking, and they had not any notice of Seager & Co.'s mortgage. How do you affect their conscience ?]

This is an attempt to extend the rule as to tacking, which has never been approved : *Ireson v. Denn.* (a) The Court will not extend such a rule, so as to defeat by a transaction in 1856 a mortgage made in 1841. *Lacy v. Ingle* (b) is against the plaintiffs' claim.

\* *Mr. Willcock* and *Mr. Beales*, for the assignees of Randall.—The first mortgage was a mortgage of real estate ; the mortgage of 1856 did not include any real estate of Randall. No authority extends the rule as to tacking to a case where one mortgage is a mortgage of realty, the other of personalty only. If both mortgages are mortgages of realty it is rationally supposed that in each instance the real estate of the mortgagor was in the contemplation of the parties. Newman could have redeemed the mortgage of 1856 without redeeming the other. Randall was only his surety and must have the same right. \* 716

[LORD JUSTICE TURNER. — Does it follow because Newman could that you can ? The rule as to tacking in such cases depends on the principle that he who comes into equity must do equity ;<sup>1</sup> and the question appears to turn upon what are the equities affecting the person who seeks relief.]

*The Solicitor-General*, in reply. — *Lacy v. Ingle* has nothing to do with the case ; it merely decided that a security on purchase-money is only a security on what remains after paying off all incumbrances prior in date. A Court of Equity looks at substance, not at form, and, seeing that both mortgages were in fact made to the company, will not regard the circumstance that they were taken in different names. All parties concerned knew throughout that the mortgages were made to the company. *Ex parte Ber ridge* (c) is an instance of overruling a similar objection in point

(a) 2 Cox, 425. (b) 2 Phill. 413. (c) 3 M., D. & De G. 464.

<sup>1</sup> See 1 Story Eq. Jur. § 64 e; *Colvin v. Hartwell*, 5 Cl. & Fin. 522.

of form. As to the argument founded on suretyship, it is true that the surety has the rights of the creditor as against the principal debtor, but not so as to override the rights of third

\* 717 parties: *Farebrother v. Wodehouse.* (a) \* The second mortgagees here took with notice of the first mortgage, and therefore subject to all equities attached to it, one of which equities is, that if the mortgagor gives for another sum a security which becomes vested in the first mortgagee, the prior mortgagee has a right to insist that neither mortgage shall be redeemed separately.

THE LORD JUSTICE KNIGHT BRUCE.—The circumstance that the Kent Fire Insurance Company were represented on different occasions in the course of these transactions by different persons is, in my opinion, immaterial. The fact of their interest was known throughout to all concerned. That being so, there can be no difficulty, for we are, on the statements of the case, to treat the matter as if there had not been any sale, and therefore in effect as if Messrs. Seager & Co. had filed a bill to redeem the Kent Fire Insurance Company in respect of their first mortgage alone. The company would have answered "we are willing to be redeemed ; but not unless you redeem both mortgages. You must redeem both or neither." That is the only question in the case, and it seems to me that the Kent Fire Insurance Company are right, both as against the assignees and as against Messrs. Seager & Co., who took their security with notice of the first mortgage of 1832.

THE LORD JUSTICE TURNER.—The question in this case depends, according to the authorities, on the obligations which attach on a person coming to the Court for relief, one of which is, that if he comes to redeem a security, he cannot do so without

\* 718 \* redeeming any other security which the defendant holds upon property of his. It makes no difference whether

the securities are held by the same person or in trust for the same person. The case is governed by the authorities, though there may be some difficulty in the question whether the rule established by them is a just result of the principle on which they proceed.

(a) 23 Beav. 18.

# AN INDEX

TO

## THE PRINCIPAL MATTERS

CONTAINED IN THIS VOLUME.

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**ABSOLUTE CONVERSION.** See **CONVERSION.**

**ACCIDENT.** See **BANKRUPTCY**, 4.

**ACQUIESCE.**

A canal company, having power to purchase lands for gross sums or for annual rent-charges, to be determined by commissioners in cases of disability, took possession of the lands of an infant, on an agreement with his steward, and after an award by the commissioners of the gross sum or annual rent-charge which ought to be paid, but which award was invalid, no one being party to it who had power to bind the infant's interest, the awarded gross sum was paid by the company to the steward, on an agreement for its return if the land were not conveyed to the company on the infant attaining his majority. No conveyance was executed, and the purchase-money was returned, but the company continued in the use of the land for their canal, paying to the land-owner, for forty years after he attained his majority, a rent of nearly the amount awarded by the commissioners. The company also with his knowledge purchased the interests of leaseholders in the lands: *Held*, that an action of ejectment brought by the landowner and the intended erection of a bridge by him ought to be restrained by injunction, on the ground of acquiescence, the company undertaking to put in force their parliamentary powers (which had not expired) to acquire \*the land. — *Somersetshire Coal Canal Company v. Harcourt*, \*720 596.

**ADJUDICATION.** See **BANKRUPTCY.**

**ADMINISTRATION OF ASSETS.**

Property specifically bequeathed is not discharged from its liability to the testator's debts by the circumstances that there has come to the hands of the executor personal property of the testator not specifically be-

queathed more than sufficient to pay his debts and funeral and testamentary expenses, and that the specifically bequeathed property has been made over by the executor to the specific legatee.

An executor assigned a leasehold to a person to whom it was specifically bequeathed, and allowed the residuary legatee to take possession of the rest of the property, including another leasehold. After this the rent of the second leasehold fell into arrear, and the landlord, being unable to obtain payment from the residuary legatee, filed a bill for administration of the testator's estate: *Held*, that he was entitled to have the arrears paid in full out of the specifically bequeathed leasehold, whatever the rights of the specific legatee might be as against the executor or the residuary legatee.

The rule applied in *Gillespie v. Alexander* (3 Russ. 130) is not applicable where the estate has not been administered by the Court.—*Davies v. Nicolson*, 693.

See PRACTICE, 4.

AGENT. See MISREPRESENTATION. VENDOR AND PURCHASER, 2.

AGREEMENT. See SPECIFIC PERFORMANCE.

AGREEMENT BY PROMOTERS OF COMPANY. See PUBLIC COMPANY.

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AGREEMENT (PRESUMPTION OF). See PRESUMPTION.

ALTERATION. See PROMISSORY NOTE.

ANNUITANT. See TRUST.

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ARRANGEMENT CLAUSES. See BANKRUPTCY, 1.

ASSETS. See ADMINISTRATION OF ASSETS.

ASSIGNEES IN BANKRUPTCY.

A creditor under a bankruptcy sold the dividends to be received upon \* 721 \* the proof of his debt. It appeared that, as to a proportion of the purchased dividends, the purchaser had bought them on behalf of one of the creditors' assignees. In a suit by the vendor to set aside the sale, the Vice-Chancellor held, that the validity of the sale (as to the proportion bought on behalf of the assignee and as between him and the vendor) depended on the fact of the vendor believing, or having sufficient reason to believe, that the purchase was made for the assignee's benefit; that if such belief existed, the purchase would enure for the benefit of the general creditors to the extent of the assignee's interest; and his Honor directed issues to determine that fact; and held, that the purchase was valid as to the other proportions. But held, upon appeal, that the transaction was altogether void, irrespectively of the vendor's belief, and the purchase was set aside.

A suit instituted in 1856 to set aside a sale made in 1853 not too late unless made under special circumstances. Respondents ordered to pay the costs of the appeal.

Observations upon the duties of assignees.—*Pooley v. Quilter*, 327.

ASSURANCE. See INSURANCE.

BANKER. See SHORT BILLS.

BANKING COMPANY. See JOINT-STOCK COMPANY.

BANKRUPTCY.

1. Where after admitting a debt under a trader debtor summons, the debtor obtained protection under the arrangement clauses of the Bankrupt Law Consolidation Act, and the creditor petitioned for adjudication in bankruptcy, but did not proceed to obtain adjudication, and adjudication was obtained on the petition by another creditor: *Held*, that the adjudication was valid. — *Ex parte Dales, Re Dales*, 206.
2. Certificate refused to a bankrupt on the ground that the proceedings in bankruptcy were taken collusively for his benefit, and that there were no assets whatever for distribution. — *Ex parte Sellers, Re Sellers*, 218.
3. The 125th section of the Bankrupt Law Consolidation Act (12 & 13 Vict. c. 106), relating to goods in the order and disposition of a bankrupt "at the time he becomes bankrupt," extends to goods which are in his order and disposition at the time of his committing any act of bankruptcy capable of supporting the adjudication, though such act be prior to the act on which the adjudication is founded.

*Per* the Lord Justice TURNER. The Act for the Registration of Bills of Sale (17 & 18 Vict. c. 36) does not narrow the application of the doctrine of reputed ownership. — *Stansfeld v. Cubitt*, 222.

- \* 4. Where, by an accident, a petition of appeal in bankruptcy did not reach the registrar's office in office hours on the last day for entering it, but was on that day tendered to one of the clerks in the office at his residence, who declined to receive it, doubting his authority to do so, the Court ordered the petition to be received as of that day, without prejudice to any objection. — *Ex parte Harrison, Re Harrison*, 229.
5. B. was the sole registered proprietor of certain newspapers published by him on premises of which he was the rated occupier, and he was the owner of the type and plant used in the publication. He mortgaged the newspapers, type, and plant to F., who took no steps to alter the registration of proprietorship. The sheriff entered under an execution issued by a creditor of B., and, though possession was demanded by F., remained in possession till B. had become bankrupt, which took place after two days.

*Held*, that the right of publishing a newspaper is goods and chattels within the meaning of the enactment of the Bankrupt Law Consolidation Act as to reputed ownership.

*Held*, that the type and plant were not within the order and disposition of the bankrupt, at the time of his bankruptcy, with the consent of the true owner, but that the right of publication of the newspapers was not capable of seizure by the sheriff, and that as the bankrupt continued the sole registered proprietor, and nothing had been done to make it apparent that he was not the sole owner, the doctrine of reputed ownership applied. — *Ex parte Foss, Re Baldwin*, 230.

See ASSIGNEES IN BANKRUPTCY. JOINT-STOCK COMPANY. SHORT BILLS.

**BILL (OFFER BY).** See TRUST.

**BILLS OF SALE.** See BANKRUPTCY, 3.

**BOARD OF WORKS.**

A district board of works acting under the Metropolis Local Management Act, 18 & 19 Vict. c. 120, made an *ex parte* order on the plaintiff to turn into water-closets the privies attached to certain cottages belonging to him, and, on his failing to do so, they proceeded to enter upon the premises for the purpose of doing it themselves. The order appeared to have been made, not with regard to the state of this particular property, but in consequence of a previous determination to substitute water-closets for privies throughout the district. *Held*, that the board were exceeding their statutory powers, and ought to be restrained from entering on the plaintiff's property for the purpose of making the alteration.

\* 723 *Per the Lord Justice TURNER.* — Assuming that the Act authorizes \* a board to require such an alteration as the above in particular cases, still the board is bound to exercise its discretion in each particular case, and is acting *ultra vires*, if, without exercising such discretion, it proceeds to make the alteration in pursuance of a determination to require it to be made in all cases. — *Tinkler v. Wandsworth District Board of Works*, 261.

#### CANAL COMPANY.

By an Act of 1846 a railway company was authorized to purchase the S. canal, and was bound to maintain the canal and keep it open for traffic when purchased. By this Act it was provided, that as soon as the purchase was completed the railway company might exercise all the rights, powers, and privileges which the canal company might before the sale have exercised in relation to the canal under any Acts relating to the canal which might be in force at the time of the conveyance. The canal company did not, before the sale, take any steps to adopt the powers of 8 & 9 Vict. c. 42 (the "Act to enable Canal Companies to become Carriers of Goods upon their Canals"). After the purchase the railway company proceeded, under the 8th section of the last-mentioned Act, to take a lease of the tolls of the W. canal. The clerk of the G. canal company, which was likely to be injured by the granting of the lease, took shares in the railway company and filed a bill, on behalf of himself and the other shareholders, to prevent the acceptance of the lease, as being *ultra vires*.

*Held*, that by the purchase of the S. canal the railway company had become a canal company, so as to be entitled to avail itself of the powers given to canal companies by the 8 & 9 Vict. c. 42, and that the taking of such lease was therefore not *ultra vires*.

Whether, if the acceptance of the lease had been *ultra vires*, the Court would have declined to interfere, on the ground that the bill was filed by the nominee of another company with a view solely to the interests of that

\* company, quare? — *Rogers v. Oxford, Worcester, &c., Railway Company*, 662.

CERTIFICATE. See BANKRUPTCY, 2.

CHAMPERTY. See TRUST.

CHARGE. See COVENANT.

CHARITABLE BEQUEST.

A testator gave his residuary personal estate to "Lord J. M., or the secretary for the time being of 'The Association for buying Improper Tithes and revesting them in the Church of England,'" \* and \* 724 directed that his debts, &c., should be payable primarily out of such property as he could not give to charity, and that his pure personality should be applied "to the above-mentioned charitable purpose." No society of the above name existed, but Lord J. M. was the secretary of an association called "The Tithe Redemption Trust," established for the purpose of promoting the restoration of improper tithes to the Church. It was alleged that several of the modes in which this association employed its funds were such that a bequest might legally be made to it: *Held*, that assuming the association to have objects not interfered with by 9 Geo. 2, c. 36, and assuming a bequest to it generally to be valid, the testator had in the present case himself pointed out the application of his money to a particular object, that this object was one for which a gift by will cannot be made, and that the bequest was void. — *Denton v. Lord John Manners*, 675.

CHILDREN (CUSTODY OF). See HUSBAND AND WIFE.  
CODICIL.

A testator gave an estate to his daughter E. for life, and after her death upon trusts for her children, and made similar dispositions of other estates in favour of his daughter A. and his sons J. and W. respectively and their respective children, and gave his residuary estate to E. and A. equally. By a codicil he gave the residue to his wife for life, and after her death between E., A., J., and W. equally, "precisely in the same way as the shares before given to them in my will:" *Held*, that the shares of the residue were not given absolutely by the codicil, but were subject to the limitations contained in the will as to the estates specifically devised. *Held*, also, that E. and W. having died without issue, their shares in the residue went to the personal representatives of E. and A., the absolute gift to E. and A. in the will remaining to that extent unaltered. — *Re Colthead*, 690.

COLLISION.

The 504th and 514th sections of the Merchant Shipping Act, 1854, limiting the damages to be recovered in case of collision by reference to the value of the vessel doing the injury and her freight, do not apply to a collision on the high seas between foreign ships, of which the owners are foreigners.

General words in an Act do not always extend to every case which falls literally within them. — *Cope v. Doherty*, 614.

COLLUSION. See BANKRUPTCY, 2.

- COMMITTEE. See LUNATIC, 2.
- \* 725 \* COMPANY (PURCHASE OF SHARES BY). See JOINT-STOCK COMPANY, 8.
- COMPROMISE (BY COUNSEL). See SPECIFIC PERFORMANCE.
- CONDITION. See WILL.
- CONDITIONAL SALE. See MORTGAGE, 1.
- CONSENT CAUSE. See PRACTICE, 4.
- CONSTRUCTION (OF WILL). See WILL.
- CONSTRUCTIVE FRAUD. See LYING BY.
- CONTRIBUTION. See ADMINISTRATION OF ASSETS.
- CONTRIBUTORY. See JOINT-STOCK COMPANY. MISREPRESENTATION.
- CONVERSION.

A testator gave an estate to his daughter E. for life, and after her death to his executors, in trust to sell and to divide the proceeds equally between her children, their shares to be vested in them at twenty-one, with clauses of survivorship and accrue, and a direction for maintenance out of the "interest and proceeds" of their shares after E.'s decease till their shares vested. He made similar dispositions of other estates in favour of his children, A., J., and W. respectively, and their respective children. He then gave the residue of his property to E. and A., and if any of the four children should die under twenty-one, he gave the part or parts intended for them respectively to the survivors or survivor of them for life, and after the decease of such survivors or survivor he gave such part or parts to his executors, in trust to sell and to pay the proceeds to their, his, or her child or children. E. and W. attained twenty-one, and died without having had any child.

*Held*, that the trusts for sale of the estates devised to E. and W. respectively for life were absolute, and did not depend on E. and W. having children, and that the interests which E. and A. took in those estates under the residuary gift were personal estate. — *Wall v. Colshead*, 683.

CONVEYANCE (EXECUTION OF). See VENDOR AND PURCHASER, 2.

COSTS OF ABANDONED EXAMINATION. See PRACTICE, 9.

COSTS OF APPEAL. See ASSIGNEES IN BANKRUPTCY.

COSTS OF HABEAS CORPUS. See JERSEY.

\* 726 \* COSTS OF TRUSTEES. See TRUSTEES, 2.

COUNSEL (AUTHORITY OF). See SPECIFIC PERFORMANCE, 2.

COVENANT.

1. A covenant that the covenantor would on or before a specified day either by a charge on freehold estates in England or Wales, or by an investment in the funds, or by the best means which might be then in his power, secure the payment of an annuity to a trustee for his wife: *Held*, not of itself sufficient to create a charge on the covenantor's property.

*Roundell v. Breary*, 2 Vern. 482, explained and corrected.

*Quære*, whether *Wellesley v. Wellesley*, 17 Sim. 59, ought to be followed. — *Countess of Mornington v. Keane*, 292.

2. A father in contemplation of his son's marriage covenanted within one  
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month to convey and settle lands to the value of 150*l.* to uses for the benefit of the intended husband and wife and their family. Pending the treaty for the marriage, particular lands were agreed to as those to be settled, but no conveyance was executed. The father and the son's wife died, and the son married again, and settled the lands in question on his second marriage. *Semble*, by the Lord Keeper Sir NATHAN WRIGHT, recommending a compromise by which the suit was terminated, that the plaintiff, the only child of the first marriage, ought to be relieved as against her father, the heir-at-law of the settlor, but not beyond the descended estate. — *Roundell v. Breary*, 319.

CREDITOR. See INSURANCE.

CREDITOR'S SUIT. See WAIVER.

DECREE (IN CREDITOR'S SUIT). See WAIVER.

DELAY. See ASSIGNEES IN BANKRUPTCY. LYING BY, 2. PRACTICE, 10.

DEVISAVIT VEL NON. See PRACTICE, 3.

DIRECTORS. See JOINT-STOCK COMPANY, 8. MISREPRESENTATION.

DISCRETION. See MAINTENANCE.

DISSENTERS. See SCHOOL.

DISSOLUTION (OF JOINT-STOCK COMPANIES). See JOINT-STOCK COMPANY.

\* ELECTION (OF REMEDY). See SPECIFIC PERFORMANCE, 2.  
ENFORCING ORDER. See PRACTICE, 7.

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EQUITY TO SETTLEMENT. See VOLUNTARY SETTLEMENT.

EXECUTION. See BANKRUPTCY, 5.

EXTINGUISHMENT. See MERGER. WAIVER.

FIERI FACIAS. See PRACTICE, 7.

FORGERY. See PURCHASE WITHOUT NOTICE.

FRAUD. See INSURANCE.

FRAUDULENT CONVEYANCE.

A. voluntarily gave to his sisters a mortgage to secure an antecedent debt.

The sisters allowed him to retain the title-deeds, that he might be enabled to give a first mortgage to secure another debt, for which he was being sued by B. A. deposited the deeds with B. to secure that debt, and afterwards, without B.'s concurrence, got possession of them and mortgaged the estate to the plaintiffs for a considerably larger sum, and delivered the title-deeds to them, they having no notice of the mortgage to the sisters: *Held*, that the mortgage to the sisters must be postponed to that of the plaintiffs, for that the sisters, having, with a view to A.'s raising a certain sum in priority to their mortgage, put it into his power to represent himself as unencumbered owner, could not, as against the plaintiffs, who advanced money on the faith

of A.'s possession of the deeds, complain that A. had raised more than was agreed upon.

*Semble*, that the mortgage to the sisters was void as against the plaintiffs under Stat. 27 Eliz. c. 4.—*Perry-Herrick v. Attwood*, 21.

FRAUDULENT TRANSFER. See JOINT-STOCK COMPANY, 8.

FURTHER CONSIDERATION. See WAIVER.

FUTURITY (WORDS OF). See WILL.

GENERAL ORDER 10th May, 1839. See PRACTICE, 7.

GENERAL WORDS (IN STATUTE). See COLLISION.

GOODS AND CHATTELS. See BANKRUPTCY, 5.

GOOD-WILL. See PARTNERSHIP.

\* 728 \* HABEAS CORPUS. See JERSEY.

HUSBAND AND WIFE.

1. By a memorandum of agreement made between a husband and his wife, who was suing him for a divorce, it was agreed that a deed of separation should be executed, containing, among other provisions therein mentioned, provisions that two of their children should be placed entirely in the custody of the wife, that none of the children should be sent to any school in Berkshire, or at a less sum than 60*l.* a year for each child, and that neither of the two eldest sons should be sent to any school without the written consent of both husband and wife, unless to certain specified places of education.

*Held*, that the provisions as to the children were contrary to public policy, as interfering with the due discharge of the father's duties with respect to them; and that on this ground, apart from all other objections, a decree for the execution of the deed of separation could not be made, though, if it had been executed, the insertion of those provisions would not have made it wholly void.—*Vansittart v. Vansittart*, 249.

2. Lands of a wife were settled to such uses as she and her husband should appoint and subject thereto to the use of the husband for life, with remainder to the wife for life, with remainder to the children of marriage. Two days afterwards the husband and wife, in exercise of the power, appointed the lands to the use of trustees upon such trusts as the husband alone should appoint, and subject thereto in trust for the husband for his life, or till his bankruptcy, with remainder in trust for the wife for life, and after her death on the trusts declared by the former deed. Some months afterwards the husband executed a mortgage, reciting merely an agreement for a loan, and thereby appointed that the trustees should hold the lands upon trusts for sale, and securing the repayment of the mortgage money, and subject thereto upon trust for the husband and his heirs. *Held*, by the Lord Chancellor and Lord Justice TURNER, dissentient Lord Justice KNIGHT BRUCE, that the equity of redemption was effectually resettled, and belonged to the husband in fee.—*Heather v. O'Neil*, 399.

INDORSEMENT. See PROMISSORY NOTE.

INJUNCTION. See CANAL COMPANY. PRACTICE, 8, 10.

INSURANCE.

J. being unable to pay the premiums of policies effected by him on his own life, gave to T. a *post obit* bond for 14,000*l.*, payable on the death of J.'s father if J. survived him, and if T. had in the mean time kept up the policies. In fixing \* the sum of 14,000*l.* regard was had \* 729 not only to the amount of premiums required to keep the policies on foot, but also to the amount of premiums to be paid for keeping the life of J. insured in the sum of 14,000*l.*, to be paid in the event of his dying in his father's lifetime. This was known to J., who knew also that T. intended to effect this latter insurance, but there was not any agreement that T. should do so. T. did effect the insurance. J. died in his father's lifetime, appointing T. one of the executors: *Held*, that, no contract for T. to insure being proved, T., and not the estate of J., was entitled to the benefit of the policy which T. had effected.

*Held* also, that if the transaction as to the *post obit* bond was a fraud upon J., then T. had no insurable interest in J.'s life; the insurance office was not liable on the policy; and the sum insured could not, if paid by the office, be claimed by J.'s estate. — *Freme v. Brade*, 582.

INTERROGATORIES. See PRACTICE, 9.

ISSUE AT LAW. See PRACTICE, 3.

#### JERSEY.

Where an inhabitant of Jersey had been imprisoned there for serving upon another inhabitant process in an English action under the Common-Law Procedure Act: *Held*, that the imprisonment was unlawful, and that the prisoner was entitled to be discharged on a *habeas corpus*.

Another prisoner who was detained in custody not only for the above cause, but also for debts under orders purporting to be made by the Royal Court of Jersey, obtained a *habeas corpus* on an affidavit stating that the orders were made when the Court was insufficiently constituted, and without affidavits of debt such as were required by the law of the island. It appeared, however, on the statements of the affidavit, that the prisoner had taken proceedings after the alleged irregularity had occurred: *Held*, that the Royal Court was not shown to have been insufficiently constituted, and must be assumed to be competent to judge of its own law, and that the prisoner was not entitled to his discharge.

The Court has authority to give to the functionary who brings up a prisoner in obedience to a writ of *habeas corpus* at common law the expenses of so doing, but not his general costs. — *Dodd's Case*, 510.

#### JOINT-STOCK COMPANY.

1. B., a shareholder in a mining company on the cost-book principle, retired from it under a provision in the cost-book enabling a shareholder to surrender his shares. A few weeks afterwards, the company \* was registered under 19 & 20 Vict. c. 47, and B.'s name was \* 730

entered in the register and returned in the list of shareholders. An order having been subsequently made for winding up the company, the commissioner placed B.'s name on the list of contributors: *Held*, that B.'s name ought never to have been on the register of shareholders, and ought to be removed from it under the power given by 19 & 20 Vict. c. 46, § 25, of amending the register, and that it ought also to be removed from the list of contributors.

Whether the name of a registered shareholder can be removed from the list of contributors without an amendment of the register, *quere*. — *Re Welsh Potosi, &c., Company. Birch's Case*, 10.

2. A shareholder in a mining company on the cost-book principle gave notice, according to the rules of the company, of his ceasing to be a member of it. Afterwards the company was registered under the Joint-stock Companies Act, 1856, as a limited company, and was subsequently wound up: *Held*, that the shareholder was not liable to be placed on the list of contributors of the company ordered to be wound up. — *Re Welsh Potosi, &c., Company. Lofthouse's Case*, 69.

3. An order for a call was made on 10th September, 1857, in the course of winding up a joint-stock company in bankruptcy under the Joint-stock Companies Act, 1856. On 20th November, 1857, an order peremptory was made on C., a contributor, for payment of the amount payable by him in respect of the call. On 27th November he obtained from the commissioner an order suspending the last-mentioned order. On 3d February, 1858, the commissioner rescinded the order of 27th November. C. then appealed against the orders of 10th September, 20th November, and 3d February: *Held*, that as the Act of 1856 gave no right of appeal except by reference to the Bankrupt Law Consolidation Act, and no appeal had been brought against either of the orders of 10th September and 20th November within the time limited by the 12th section of the latter Act, those orders could not be questioned.

*Held*, further, that as the orders of 10th September and 20th November could not be appealed from, it must, in determining whether the suspending order should be continued or not, be assumed that those orders were originally right. — *Ex parte Clarke, Re Welsh Potosi, &c., Company*, 245.

4. A joint-stock banking company constituted under 7 Geo. 4, c. 46, became insolvent, and in November, 1857, stopped payment, but no resolution was passed for dissolving it. In the following month it was registered under the Joint-stock Banking Companies Act, 1857, in pursuance of a resolution come to after the stoppage. *Held*, by the Lord Justice

\* 781 TURNER, *dissentient* \* the Lord Justice KNIGHT BRUCE, that the registration was valid, for that, in order to bring a company within the 6th section of the Act, it is not necessary that it should continue to carry on business up to the time of its registration.

The registrar's certificate is not conclusive as to the provisions of the Act being applicable to a company.

Consideration of the circumstances which will induce the Court to prefer a

compulsory winding-up of a company to a voluntary winding-up. — *Re Northumberland and Durham District Banking Company*, 357.

5. The provisions of 7 & 8 Vict. c. 111, as to the bankruptcy of joint-stock companies, continue applicable to a company until its affairs have been finally wound up as regards its creditors, and it may therefore be adjudicated bankrupt under that Act after it has ceased to carry on business and has been dissolved by act of law.

After an order had been made under 11 & 12 Vict. c. 45, for winding up a company and official managers appointed, a creditor sued the company with a view of obtaining a judgment upon which to found an act of bankruptcy. The official managers appeared in the action and afterwards allowed judgment to go by default: *Held*, that though the action was irregular, as it ought to have been brought against the official managers, yet after judgment it was too late to take the objection.

By a Judge's order made in the action it was directed that the judgment, when obtained, should not be available for any other purpose than to make the company bankrupt: *Held*, that this order did not prevent the creditors, when judgment had been obtained, from being within the meaning of 7 & 8 Vict. c. 111, § 5, "in a situation to sue out execution," and that the judgment was a good foundation for an act of bankruptcy: *Held*, on the construction of the Statutes 7 & 8 Vict. c. 111, 11 & 12 Vict. c. 45, and 20 & 21 Vict. c. 78, that a valid adjudication in bankruptcy may be made against the company, though an order for winding up the company has been made and an official manager appointed before the company has committed any act of bankruptcy. The bankruptcy, however, does not, under such circumstances, divest the estate out of the official manager, but is available only for the purpose of appointing creditors' assignees to act as creditors' representatives in the winding up by the official manager. — *Re London and Eastern Banking Corporation*, 484.

6. Liquidators appointed to wind up a company under "The Joint-stock Banking Companies Act, 1857," ought, as a general rule, to be disinterested persons, and neither creditors nor shareholders. — *Re Northumberland and Durham District Banking Company*, 508.

7. A joint-stock company being in course of formation under 19 & 20

\* Vict. c. 47, W. applied for shares by a note in writing, by \* 732 which he agreed to accept them and pay the deposit on them, if allotted to him. Shares were allotted to him accordingly, and he paid the deposit, but no certificates were given to him. His name was not entered in the register of shareholders, but only in a book in which the names of persons to whom shares had been allotted were inscribed, the shares to which they were entitled not being distinguished therein by numbers, as required by the 19th section of the Act. An order having been made in the following year for winding up the company: *Held*, that the register ought to be amended by inserting the name of W., and that he ought to be on the list of contributors. — *Re West Ham Distillery Company. Whittet's Case*, 577.

8. J. was a director and shareholder in a company which had become embarrassed, and he was desirous of having it wound up. The majority of the directors, however, negatived a motion for having it wound up, and entered into an arrangement with S. for the purpose of bringing its affairs into a more prosperous state. By this arrangement S. was to have a number of shares transferred to him or his nominees, and was to have powers and privileges which it was a breach of duty to give him. J. did not, in his capacity of director, concur in or assent to this arrangement, but he transferred all his shares to a nominee of S., and agreed with S. to pay a certain sum in addition upon being released from all liability in respect of a certain demand against the company. The consent of the directors to transfers was not requisite. The Court was satisfied, on the evidence, that J. made the transfer not to facilitate the arrangements between the other directors and S., but to escape from the company, and there was nothing to show that the transferee was a trustee for the company: *Held*, that the transfer was valid, and not liable to be impeached in equity. — *Re London and County Assurance Company. Jessopp's Case*, 638.

See MISREPRESENTATION.

JUDGMENT DEBT (OF DEVISEE). See WAIVER.

LACHES. See ASSIGNEES IN BANKRUPTCY. LYING BY. TRUST.

LANDS CLAUSES ACT.

A railway company compulsorily purchased portions of the plaintiff's land for the purpose of a branch railway, but suffered their powers to expire without making it. Before the period of ten years, within which they were bound to dispose of superfluous lands, had expired, they promoted a bill for enabling them to make another \* branch railway, and proceeded to carry on works on the above portions of the plaintiff's land for the purposes of the proposed branch line.

*Held*, that the plaintiff's right of repurchase under the 128th section of the Lands Clauses Act had not arisen, for that the words "dispose of" in that section refer to a transfer of the land to some other person, not to its application to a new purpose.

*Held*, further, that the abandonment by the company of the undertaking for which the lands were purchased, did not, independently of legislative enactments, give the plaintiff any right to a reconveyance.

*Held*, also, that the plaintiff had no equity to restrain the company from any user of the land not shown to be productive of irreparable injury to it. Whether the plaintiff would have had a right to restrain a user productive of such injury, *quære*. — *Astley v. Manchester, Sheffield, and Lincolnshire Railway Company*, 453.

LEASE.

The Act 8 & 9 Vict. c. 106, § 3, does not prevent an instrument which (as containing words of present demise and not being under seal) is void as a lease from being used as an agreement.

Where terms for letting farms provided that all materials required for buildings proposed to be built, or that might thereafter be built, should be led at the expense of the tenant; that the landlord should drain, the tenant leading tiles; that gates, buildings, " &c.," should be left in repair by the tenant, the landlord finding new gates when required; that the landlord reserved to himself all customary rights and reservations, such as liberty to cut and plant timber, search for and work mines or minerals, " &c.," allowing the tenant for any reasonable damage: *Held*, that these stipulations did not render the agreement uncertain, so as to be incapable of being enforced specifically. — *Parker v. Taswell*, 559.

See CANAL COMPANY.

LEGACY. See ADMINISTRATION OF ASSETS.

LIMITATIONS (STATUTE OF).

O., L., and H. carried on business as copartners under articles containing a covenant by which the partnership effects were made a security for the repayment of the sum in which the concern might be indebted to any partner, and the other partners covenanted to make up the deficiency according to their equitable liability. After the deaths of O. and L. their respective personal representatives filed a bill against H. to take the account of the partnership, and a receiver was appointed, who got in the assets, and, without the sanction of the Court, but with the approbation of the parties, paid them \* to the executors of O., \* 734 to whom the partnership was largely indebted, and the suit was not further prosecuted. These payments were insufficient to discharge the debt due to O.'s estate, and the estate of L. remained liable to the estate of O. to a considerable amount in respect of that debt: *Held*, that it not being proved that the receiver made the payments with the sanction of the personal representative of L. for the purpose of discharging the liability of L.'s estate, those payments did not take the demand against L.'s estate out of the Statute of Limitations. — *Whiley v. Lowe*, 704.

See MORTGAGE, 1. TRUST.

LIQUIDATORS. See JOINT-STOCK COMPANY, 6.

LUNATIC.

1. Where in a suit for the partition of lands in which the lunatic was entitled to an undivided share, a partition had been made and the lunatic declared a trustee within the Trustee Act, 1850: *Held*, on a petition by the lunatic to have the partition carried into effect, that the Lords Justices could, under the Trustee Act, 1850, and the Lunacy Regulation Act, 1850, direct the committee to convey according to the partition. — *Re Bloomar*, 88.
2. A lady who had been found lunatic obtained leave to traverse, and no committee was appointed. Her husband, who had petitioned for the inquisition, having, before the trial of the traverse, become incapable of attending to business, the Court appointed interim committees of

the lady's person, with liberty to take such proceedings with respect to the traverse as they should think fit. — *Re Armstrong*, 123.

See MAINTENANCE.

LYING BY.

1. G. having entered into a contract for the purchase of a ship not binding under the Registry Acts, agreed with the plaintiff that the plaintiff should set up engines in her, to be paid for at a specified price if a certain speed was attained, but, if not, to be removed by the plaintiff. The plaintiff, with the knowledge and approbation of Y., the registered owner, set up the engines, which did not enable the vessel to attain the required speed. Y. then refused either to pay the stipulated price or to allow the plaintiff to remove the engines: *Held*, reversing the decision of the Court below, that the plaintiff's remedy against Y., if any, was at law, and that there was no ground for equitable interference.

The equitable rule, as to the effect of a person's lying by and allowing another to expend money on his property, does not apply where

\* 735      the money is expended with \* knowledge of the real state of the title.  
— *Rennie v. Young*, 136.

2. W. H. and A. H. worked a mine in partnership under a lease which expired in 1845, and then as tenants from year to year till 1847, when W. H. died, leaving a will, by which he appointed M. H. executrix, and gave certain interests in the mine to H. F. H. A. H., after the death of W. H., remained in possession, claiming to be solely entitled to the mine and plant, and though M. H. made frequent applications to him for an account, he refused to render any. In 1850, notice to quit in March, 1851, was served by the landlord on A. H., who, about the latter period, agreed with the landlord for a new tenancy of the greater part of the mine, on terms much more burdensome than those of the old tenancy. At the death of W. H. the mine was barely kept going, and was producing no profits, and things had remained in much the same state till March, 1851. No notice was given to M. H. of the negotiation for the new tenancy under which A. H. remained in possession and incurred considerable outlay. In November, 1851, H. F. H. filed a bill against M. H. and A. H. to establish his title to an interest in the mine. M. H. put in an answer admitting his title. A. H. did not answer, but obtained an order for security for costs, and the suit was not further prosecuted. A. H. died intestate in December, 1853, and M. H. became his personal representative. The plaintiff, in 1854, took an assignment of the interest of H. F. H., and filed his bill in the nature of a supplemental bill to the former bill, to have the interest of W. H. in the mine secured for his benefit.

*Held*, by the Lord Chancellor and the Lord Justice TURNER (the Lord Justice KNIGHT BRUCE doubting), that the equity of the persons claiming under W. H. to have the benefit of the renewal by A. H. of the tenancy was not displaced, and that the estate of W. H. had a continuing interest in the mine.

*Per* the Lord Chancellor, the doctrine of *Prendergast v. Turton*, 1 Y. & C. C. C. 98; 18 L. J. (N. S.) Ch. 268, does not apply where a surviving partner has refused to give the representatives of a deceased partner all the information as to the state of the concern which is necessary to enable them to exercise a sound discretion as to whether they should claim an interest in and take a share of the risks of the concern. — *Clements v. Hall*, 173.

#### MAINTENANCE.

A testator gave a fund to trustees in trust to pay the income to his sister for her life or "apply the same, or so much as may be necessary for her support and maintenance, in such manner as may be most to her comfort and advantage." \* He then directed the surplus, if any, \* 736 to be accumulated and added to the capital of the fund, which was given over after her death. The sister, who was of unsound mind, was entitled to a life-interest under a settlement of which the testator was a trustee. After the testator's death she was found lunatic, and the allowance for her maintenance was fixed at a sum exceeding the income of the bequeathed fund: *Held*, that this income was the primary fund for her maintenance, and that therefore the whole of it must be so applied. — *Rudland v. Crozier*, 143.

See CHAMPERTY AND MAINTENANCE. TRUST.

MARRIED WOMAN. See SETTLED ESTATES ACT.

#### MERGER OF CHARGE.

T. by a settlement covenanted with the trustees that, in the event of his dying in the lifetime of his daughter C. H. T. before she should have attained twenty-one or married, his heirs, executors, or administrators should within six months after his decease pay to the trustees 10,000 $\text{l}.$ , with interest thereon from the day of his decease; and it was declared that, in the event of C. H. T. having no child who should attain twenty-one or marry, then the fund, after her decease, should form part of T.'s personal estate. By the same deed T. charged all his real estate with this sum. T. afterwards, in consequence of a requisition made by persons who were advancing him money on mortgage, paid the 10,000 $\text{l}.$  to the trustees, who released the estate from it. The trustees subsequently lent part of this sum to T. himself, on mortgage of part of the estates originally subject to the charge, and the rest of it to other persons. T. died, leaving a will, by which he bequeathed his personal estate to the plaintiff and his real estate to the defendant. C. H. T. died an infant and unmarried within five months after his death: *Held*, that no part of the 10,000 $\text{l}.$  belonged to the devisees of the real estate, but that the whole belonged to the legatee of the personality. — *Tucker v. Loveridge*, 650.

MINES. See LYING BY, 2.

#### MISREPRESENTATION.

Where the appellants had been induced to execute the deed of settlement of VOL. II. 37 [ 577 ]

a company as shareholders, by a representation made by the promoters of the company (who were intrusted with the deed for the purpose of obtaining signatures to it) that two specified individuals would execute it, and this representation, although honestly made, proved erroneous:

\* 737 *Held*, that it was not sufficient to \* exonerate the appellants from liability as shareholders.

*Quare*, how far directors can be regarded as the agents of a company for the purpose of making false representations by which the shareholders or the public are deceived.

Brockwell's case, 4 Drewry, 255, observed upon. — *Re Hull and London Life Insurance Company. Gibson's Case*, 275.

MISTAKE. See SPECIFIC PERFORMANCE.

#### MORTGAGE.

1. A. conveyed a life-estate to B. in consideration of 4739*l.* By a deed of even date B. contracted that if A. should at any time desire to repurchase the life-estate for 4739*l.*, B. would reconvey it to him for that sum. All the expenses of this transaction were paid by A. B. took possession, insured A.'s life for 4739*l.*, and after payment of premiums, the surplus rent was between 6*l.* and 6*l.* 10*s.* per cent on the purchase-money. B. left a will, by which he spoke of the life-estate as redeemable on payment of 4739*l.* and interest, and spoke of his interest as a security. A., after a lapse of nearly thirty years, and many years after the death of the solicitor who conducted the transaction, filed a bill to redeem, and failed in proving by direct evidence that the parties intended a mortgage.

*Held*, reversing the decision of the Court below, that the transaction was to be treated as a conditional sale, and not as a mortgage, and that A. had no right to an account of rents and profits.

*Sembler*, that his right to repurchase on the payment of the full sum of 4739*l.* was not barred by the Statute of Limitations.

Whether the Statute of Limitations was not an answer to the claim to redeem on the footing of the transaction being a mortgage, *quare*.

*Held*, that if the transaction, considered as a purchase, had been so grossly oppressive, that the Court would on that ground have treated it as intended to be a mortgage, the right to have it so treated would not have been enforced after such a lapse of time and after the death of the other parties concerned in the transaction. — *Alderson v. White*, 97.

2. Two estates subject respectively to distinct first mortgages vested in different mortgagees were both again mortgaged to the same second mortgagees. Afterwards the two first mortgages were transferred to one person, with notice of the second mortgage: *Held*, that the transferee was, in a foreclosure suit instituted by him against the second mortgagee, entitled to tack the two first mortgages together. — *Vint v. Padget*, 611.

\* 738 3. R. mortgaged an estate in 1832 to four persons, who were known by R. to lend the money as trustees \* for the K. Company. In 1841, R. mortgaged the same property to S. & Co., who had

notice of the K. Company's mortgage, but did not give the company notice of their security. In 1856, R. joined as surety for N. in a security to other persons, who, as trustees for the K. Company, advanced money to N. This security comprised real estate of N., and a policy of assurance belonging to R., who knew that the security was taken on behalf of the company: *Held*, that S. & Co. could not redeem the property comprised in the first mortgage without also redeeming that comprised in the mortgage of 1856. — *Tassell v. Smith*, 713.

See HUSBAND AND WIFE, 2. INSURANCE. TRUSTEES, 1. PRIORITY.  
MORTMAIN. See CHARITABLE BEQUEST.

NEGLIGENCE. See FRAUDULENT CONVEYANCE. PRIORITY.

NEWSPAPER. See BANKRUPTCY, 5.

NOTICE. See PURCHASE WITHOUT NOTICE. TRUST.

OFFER (IN BILL). See TRUST.

OMISSION (IN AGREEMENT). See SPECIFIC PERFORMANCE.

OPTION OF PURCHASE. See PRE-EMPTION.

ORDER AND DISPOSITION. See BANKRUPTCY, 3, 5.

#### PAROL AGREEMENT.

An agreement between A., a lessee of a mine, and B., to become partners in the mine, paying the reserved rent, subletting the mine at a royalty, and dividing the profits: *Held*, to be within the Statute of Frauds, and not sufficiently proved by a receipt signed by A. and given to B. for a sum as B.'s share of the head rent of the mine, the sum being exactly half of that rent. — *Caddick v. Skidmore*, 52.

See VOLUNTARY SETTLEMENT.

PART PAYMENT. See LIMITATIONS.

PARTIAL REVOCATION. See CODICIL.

PARTICULARS OF SALE. See VENDOR AND PURCHASER, 1.

PARTIES. See VENDOR AND PURCHASER, 1.

PARTIES (EXAMINATION OF). See PRACTICE, 9.

\* PARTITION. See LUNATIC, 1.

\* 739

PARTNERSHIP.

Although articles of partnership may be presumed from the dealings of the partners to have been waived, a single instance of departure from them is not a sufficient foundation for such a presumption.

Good-will in general means the chance of being able to keep a business connected with the place where it has been carried on, but it is in this sense inapplicable to the business of solicitors.

Where articles of partnership between London solicitors provided that either partner might retire, and that in that case the continuing partner should pay the retiring partner for his share and good-will the fair marketable

value, and the retiring partner should not practise within one hundred miles of the General Post-Office, but should use his best endeavours to promote the interests of the remaining partners: *Held*, that good-will must be taken to mean only the interest which the retiring partner would have had if he had remained in the partnership till the expiration of it by effluxion of time. — *Austen v. Boys*, 626.

See LYING BY, 2. PAROL AGREEMENT.

#### PATENT.

Where it appeared that a master and his foreman had both invented certain improvements, for which the master sought letters-patent: *Held*, that they ought only to be granted on the terms of their being vested in trustees for the master and the foreman.

In general, where there is a doubt as to the validity of the grounds of opposition to a patent, the proper course is to grant the letters-patent, as an error in refusing them would be irremediable, while one in granting them would not. — *Re Russell's Patent*, 130.

PAUPER. See PRACTICE.

PERSONAL DECREE. See WAIVER.

PETITION OF RIGHT. See PRACTICE, 5.

#### PLEADINGS.

Leave given to file a supplemental bill, with a schedule containing the original printed bill. — *The Governors of the Greycoat Hospital v. The Westminster Improvement Commissioners*, 61.

POLICY. See INSURANCE.

POSTPONEMENT. See FRAUDULENT CONVEYANCE. PRIORITY.

#### PRACTICE.

1. An order for an infant to sue *in formis pauperis* by his next friend \* 740 \* was obtained *ex parte* on an affidavit by the infant in the common form as to his own poverty: *Held*, that such an affidavit was clearly insufficient, and that the order had rightly been discharged with costs.

Whether such an order might not properly be made, if special grounds were shown, *quare*. — *Lindsay v. Tyrrell*, 7.

2. A special examiner will not be appointed for the examination of witnesses in the country, merely on the ground that they reside in a neighbourhood distant more than twenty miles from London. — *Altree v. Sherwin*, 92.

3. The fact that the validity of a will of real and personal estate executed since the passing of the Wills Act (7 Will. 4 & 1 Vict. c. 26), has been established before the judicial committee as regards the personal estate, in a proceeding to which the heir-at-law was a party in another capacity, does not take away his right to an issue *devisavit vel non*. — *Stacey v. Spratley*, 94.

4. The Court by consent made an immediate decree in a cause not in the paper for an administration of the real and personal estate of an intestate at the suit of a creditor, after a summons in chambers for the administration of the personal estate had been taken out by another

creditor, which was returnable before the first day on which the cause could be heard as a short cause. — *Furze v. Hennet*, 125.

5. The Attorney-General may dispense with the usual preliminary investigation on a petition of right.

On applying for time to answer the case found on the inquisition, the Crown ought not to be precluded from demurring. — *Re The Queen and Carl von Frantzius*, 126.

6. Upon a motion by way of appeal from an order granting an injunction, the respondent may adduce fresh evidence in support of the injunction. — *Pole v. Joel*, 285.

7. An order dated 19th November ordered A. to pay to B. a sum of money "on or before the 1st of December next, or within four days after service of this order." The order was not passed and entered till 2d December, and was never served on A. After a month from the time of entering the order, B. sued out a writ of *fieri facias* against the goods of A. for the amount: *Held*, that A. was not in default, and that the writ was irregular.

The 1st General Order of 10th May, 1839, does not authorize the issuing a writ for money payable under an order which directs payment within a certain time after service, and has not been served. — *Adkins v. Bliss, Vale v. Bliss*, 286.

8. Where a defendant at law to an action on a promissory note pleaded that it was given for a wagering debt, and filed a bill to have it delivered up and to restrain the action on the same ground, but the answer denied the allegation in the \* bill: *Held*, that he was not entitled \* 741 to retain an injunction which he had obtained before the answer was filed.

*Quare*, whether, under the present practice, an injunction ought to be granted for want of answer. — *Fox v. Hill*, 353.

9. An accounting party having brought into chambers an account, with an affidavit in support of it, the plaintiffs summoned him to attend to be cross-examined on his affidavit. He attended, but refused to be sworn until his expenses as a witness were paid, and the Court held him entitled so to refuse. The plaintiffs then abandoned the cross-examination and filed interrogatories for his examination as an accounting party: *Held*, that they could not proceed with the interrogatories till they had paid him his expenses and costs incident to the attempt at cross-examination. — *Davey v. Durrant, Smith v. Durrant*, 506.

10. An appeal after the lapse of a month from the refusal of a motion for an injunction to restrain a public company from proceeding with their works ordered to stand over till the hearing, as being brought too late. — *Williams v. St. George's Harbour Company*, 547.

See **WAIVER**.

#### PRE-EMPTION.

A testator directed his trustees to offer his real estate including a moiety of an estate of which he was tenant in common with his brother to the brother, at a specified sum, but in case the brother should not within a

month after the testator's death signify his intention to accept the property at the price, or should not at the expiration of two calendar months from the time of signifying his intention pay the purchase-money to the trustees, then the testator directed the property to be sold by auction. The brother signified his intention to purchase within the month, and required an abstract of the title. None was furnished to him within two months after the signification of his intention to purchase, and the purchase-money was not paid at the expiration of that time: *Held*, that the right of pre-emption was lost. — *Brooke v. Garrod*, 62.

#### PRESUMPTION.

\*742 A canal company, having power to purchase lands for gross sums or for annual rent-charges, to be determined by commissioners in cases of disability, took possession of the lands of an infant, on an agreement with his steward, and after an award by the commissioners of the gross sum or annual rent-charge which ought to be paid, but which award was invalid, no one being party to it who had power to bind the infant's interest. The awarded gross sum was paid by the company to the steward, on an agreement for its return if the lands were not conveyed to the company on the \* infant attaining his majority. No conveyance was executed, and the purchase-money was returned, but the company continued in the use of the land for their canal, paying to the landholder, for forty years after he attained his majority, a rent of nearly the amount awarded by the commissioners. The company also, with his knowledge, purchased the interest of lease-holders in the lands.

*Held*, that an agreement could not be presumed to have been entered into or ratified by the landholder for a sale of the fee in consideration of a rent-charge. — *Somersetshire Coal Canal Company v. Harcourt*, 596.

See PARTNERSHIP.

#### PRIORITY.

A lady lent money to her solicitor upon a deposit of title-deeds, with a written memorandum. The deeds thus deposited did not comprise the later title-deeds, and so did not show that the depositor had any interest in the estate. The solicitor afterwards deposited the remaining deeds with his bankers to secure the balance of his account: *Held*, that the lady had not, in omitting to call for the other deeds, been guilty of such gross negligence as to postpone her security to that of the bankers. — *Roberts v. Croft*, 1.

See FRAUDULENT CONVEYANCE.

PROCESS TO ENFORCE ORDER. See PRACTICE, 7.

PROFESSIONAL CHARGES. See TRUSTEES, 2.

#### PROMISSORY NOTE.

An additional signature to a promissory note, placed there some years after the date of the note, which was payable on demand: *Held*, not an alteration rendering the note void, but an addition in the nature of an indorsement, although on the face of the note. — *Ex parte Yates, Re Smith*, 191.

PROMOTERS. See PUBLIC COMPANY.

PUBLIC COMPANY.

A land-owner withdrew his opposition in Parliament to a harbour and railway bill on an agreement with the promoters that the company would take his land on certain terms. After the passing of the Act the land-owner brought an action for breach of the agreement against the promoters, which was stayed on the company being made (by arrangement) defendants to a new action and suffering judgment for the demand: *Held*, that the company thereby adopted the agreement, whether it would have been otherwise binding on them or not (as to which, *quere*), and that it was not vitiated by one of its terms being that the company should pay the costs of the land-owner's opposition to the bill. — *Williams v. The St. George's Harbour Company*, 547.

\* PURCHASE WITHOUT NOTICE.

\* 743

A bill of exchange, payable to the order of C. D., a married woman, was remitted to her in respect of her separate estate. Her husband got possession of it without her knowledge, forged her name on the back, then indorsed his own name, and gave the bill to P. to get it discounted, stating that she had indorsed it. P. got it discounted, and in order to do so was obliged himself to indorse it. He then paid the proceeds to the husband. The acceptor, in consequence of a notice from C. D., refused to pay the holder, who thereupon had recourse to P. P. paid the holder. A suit having been instituted by C. D. to establish her title to the bill and to restrain P. from suing the acceptor at law:

*Held*, that P. was to be treated as a purchaser of the bill for value.

*Held*, also, that assuming P. to have notice that the bill was drawn in respect of C. D.'s separate estate, yet as there was nothing to excite suspicion of the forgery, he was justified in relying on the husband's statement that the bill had been indorsed by her, and was not bound to inquire further as to the genuineness of her signature, and that there was therefore no equity to restrain him from the assertion of the legal title which he acquired by the husband's indorsement.

Whether the circumstance that a bill is made payable to the order of a married woman is notice that it relates to her separate estate, *quere*. — *Dawson v. Prince*, 41.

PURCHASER. See VENDOR AND PURCHASER.

RAILWAY COMPANY. See LANDS CLAUSES ACT. CANAL COMPANY.

RATIFICATION. See PUBLIC COMPANY.

RECEIPTS OF TRUSTEES. See TRUSTEES, 1.

RECEIVER. See LIMITATIONS.

REFERENTIAL GIFT. See CODICIL.

REGISTER OF SHAREHOLDERS. See JOINT-STOCK COMPANIES, 7.

REGISTRATION OF JOINT-STOCK COMPANIES. See JOINT-STOCK COMPANY.

REGISTRATION OF BILLS OF SALE. See BANKRUPTCY, 3.

REPURCHASE. See LANDS CLAUSES ACT.

REPUPTED OWNERSHIP. See BANKRUPTCY, 3. 5.

\* 744 \* REVOCATION. See CODICIL.

SATISFACTION. See MERGER.

SCHEDULE. See PLEADINGS.

SCHOOL.

Lands were purchased in the reign of Edward the 6th by inhabitants of a town, and were under a charter of that reign conveyed to trustees upon trust to maintain a school, and also for the repairs of public ways and bridges. The trustees had the power of appointing and removing the schoolmaster. The schoolmaster had always been appointed from members of the Church of England, but latterly dissenters had been admitted into the school, and had not been required to be instructed in the tenets of that church, and on some occasions dissenters had been appointed trustees, but not by the Court: *Held*,

1. That the constitution of the school could not be changed on an application for the appointment of new trustees.
2. That, without a change in the constitution of the school, dissenters were not proper persons to be trustees of the charity — *Re Ilminster Free School*, 535.

SEPARATION DEED. See HUSBAND AND WIFE, 1.

SETTLED ESTATES ACT.

The Settled Estates Act, in requiring the appointment of a solicitor to examine a married woman abroad, means a solicitor of the Court of Chancery in England, and therefore the Court refused to direct a commission to a barrister and solicitor of a Court in Canada for that purpose — *Turner v. Turner*, 534.

SETTLEMENT (VOLUNTARY). See VOLUNTARY SETTLEMENT.

SETTLEMENT (EQUIFY TO). See VOLUNTARY SETTLEMENT.

SHARES (AGREEMENT TO TAKE). See JOINT-STOCK COMPANY, 7.

SHARES (FRAUDULENT TRANSFER OF). See JOINT-STOCK COMPANY, 7.

SHARES (PURCHASE OF, BY COMPANY). See JOINT-STOCK COMPANY, 7.

SHORT BILLS.

1. Undue bills of exchange were from time to time remitted to a banker by a customer, and indorsed to the banker. The course of dealing was, that the bills were not entered short, but, though they were distinguished in the account as bills, the full amounts were entered in the cash column under the dates on which the bills were paid into the bank, and the customer \* was at all times at liberty to draw checks to the extent of the balance in his favour, as appearing on the account thus made out. Interest was allowed by the banker upon the bills only from the time when their amount was received.

*Held*, that, in the absence of evidence of the customer's acquiescing in or

authorizing the banker's treating the bills as his own from the time of their being paid in, they remained the property of the customer, subject to the lien of the banker for his cash balance; that the banker had no right to negotiate them unless the balance of the account was in his favour; and that, on the bankruptcy of the banker, such of them as remained in his hands *in specie* did not pass to his assignees, but, subject to such lien as above-mentioned, belonged to the customer.

The observations of Lord ELDON, in *Ex parte Sergeant*, 1 Rose, 153, explained. — *Ex parte Barkworth, Re Harrison*, 194.

2. B. was in the habit of drawing bills on H. & Co., bankers, and of remitting bills to them to an amount fully sufficient to meet their acceptances. H. & Co. became bankrupt. At that time there were in the hands of holders for value undue bills to a large amount drawn by B. upon H. & Co. and accepted by them, but H. & Co. had misappropriated the greater part of the bills remitted to meet them: *Held*, that B. could not claim to have returned to him such of the remitted bills as remained in the hands of H. & Co. at the time of their bankruptcy, but that they must be applied so far as they would extend in payment of the bills accepted by H. & Co. — *Ex parte Carrick, Re Harrison*, 208.

SPECIAL EXAMINER. See PRACTICE, 2.

SPECIFIC LEGACY. See ADMINISTRATION OF ASSETS.

SPECIFIC PERFORMANCE.

1. Although specific performance of an agreement may not be enforced against a defendant who reasonably misunderstood its terms, a mere case of inadvertent omission to propose an intended term is different; and therefore where an occupant of land under an expiring tenancy had always paid the tithe rent-charge, and afterwards entered into a written agreement with the landlord for a lease at the old rent, but without any stipulation being introduced as to the tithe rent-charge: *Held*, that the landlord could not insist on such a stipulation being inserted as a condition of specific performance being enforced against him. — *Parker v. Taswell*, 559.
2. During the trial of an issue *devisavit vel non*, the counsel for the heir and the devisee agreed to compromise the case on the terms of the devisee giving up the estate \* and receiving a life annuity. It was well known to the counsel and attorney of the devisee, that she was opposed to any compromise. At the time when these terms were come to, her arrival in Court was immediately expected, but the heads of agreement were signed and a juror withdrawn before she arrived. The agreement was embodied in a *nisi prius* order. The devisee having refused to comply with its terms, the heir applied to the Court of Common Law for an order to commit her, which was refused. He then filed a supplemental bill for specific performance of the agreement.

*Held*, that, assuming counsel to have, without express authority, such power to bind their clients by a compromise as to make the agreement good

at law, still an agreement made under such circumstances was one of which, in the absence of subsequent acquiescence or confirmation by the devisee, specific performance ought not to be decreed against her. *Semble*, the fact that the bill was not filed until the heir had failed in his attempt to enforce the agreement at law would alone have been a bar to specific performance. — *Swinfen v. Swinfen*, 381.

## STATUTES.

27 Eliz. c. 4. See FRAUDULENT CONVEYANCE.

Frauds. See PAROL AGREEMENT.

9 Geo. 2, c. 86. See CHARITABLE BEQUEST.

Limitations. See MORTGAGE, 1. TRUST.

1 & 2 Vict. c. 110, § 18 (Judgments). See WAIVER.

8 & 9 Vict. c. 42 (Canal Companies). See CANAL COMPANIES.

Lands Clauses Consolidation, 1845. See LANDS CLAUSES ACT.

8 & 9 Vict. c. 106, § 3. See LEASE.

Trustee Act, 1850. See VESTING ORDER. LUNATIC, 1.

12 & 18 Vict. c. 106 (Bankrupt Act). See BANKRUPTCY, 1.

16 & 17 Vict. c. 70 (Lunacy Regulation). See LUNATIC, 1.

Merchant Shipping, 1854. See COLLISION.

17 & 18 Vict. c. 86 (Bills of Sale). See BANKRUPTCY, 3.

18 & 19 Vict. c. 120 (Metropolis Management). See BOARD OF WORKS.

19 & 20 Vict. c. 46 (Joint-stock Companies Act). See JOINT-STOCK COMPANIES.

19 & 20 Vict. c. 120 (Settled Estates). See SETTLED ESTATES ACT.

Joint-stock Banking Companies Act, 1857. See JOINT-STOCK COMPANY.

STOCK MORTGAGE. See TRUSTEES, 1.

\* 747 \* SUPPLEMENTAL BILL. See PLEADINGS.

SUSPENDING ORDER. See JOINT-STOCK COMPANY, 3.

TACKING. See MORTGAGE, 2, 3.

TIME. See BANKRUPTCY, 4.

TITHE REDEMPTION TRUST. See CHARITABLE BEQUEST.

TITLE-DEEDS. See PRIORITY.

TRAVERSE. See LUNATIC, 2.

TRUST.

Sir G. B. granted to six persons annuities, payable out of his life-interest in the R. estate. He then executed a deed, called a receivership deed, to which the six annuitants and B. and R. were parties, by which he appointed B. and R. receivers of the rents; and it was declared that they should hold the rents in trust to pay the annuities, and then to pay the surplus to Sir G. B. or his assigns. The receivers accepted the trust. By another deed Sir G. B. conveyed his life-estate to a trustee on trusts for securing the six annuities, and subject thereto in trust for himself. He afterwards granted annuities to three other persons, and by a deed called a deed of direction, to which the three annuitants were parties, he directed the receivers and the trustee to pay the three annuitants out of the rents. Notice of this deed was imme-

dately served on the receivers and the trustee. *Held*, by the Lord Justice TURNER, affirming the decision of the Master of the Rolls (*dubitante* the Lord Justice KNIGHT BRUCE) : —

1. That the deed of direction made the receivers and the trustee express trustees for the three annuitants, subject to the rights of the six annuitants.
2. That in cases of express trust the Statute of Limitations is no bar to the demand of a *cestui que trust*, though the other *cestuis que trust* have for more than twenty years received from the trustee the whole of the rents to the exclusion of the claimant.

Whether the rules as to refusing relief in cases of stale demands apply in cases of express trust, *quære*.

One of the three annuities, and a share of another of them, were, pending a suit in which the title to them was in litigation, purchased in the name of T. T., by the deed transferring them to him, covenanted to indemnify the vendors against past and future costs; and at the same time he executed a declaration of trust, showing that the purchase was made principally \* on behalf of certain solicitors who acted \* 748 in the suit for the parties entitled to the residue of the three annuities, but were not the solicitors of the vendors. *Held*, by the Lord Justice TURNER, affirming the decision of the Master of the Rolls, that the purchase was not affected by the laws relating to chamerpy and maintenance, and that, even assuming it to be voidable as between the vendors and purchasers, the objection could not be taken by third parties.

The persons entitled to the three annuities offered by their bill to redeem the six prior annuitants. *Held*, by the Lord Justice TURNER, affirming the decision of the Master of the Rolls (*dubitante* the Lord Justice KNIGHT BRUCE), that it is in the discretion of the Court whether it will enforce against a plaintiff an offer made by his bill, and that, under the circumstances of the present case, the offer ought not to be so enforced. *Held*, also, by the Lord Justice TURNER, that there is no rule that an annuitant whose annuity is repurchasable, and whose title is not impeached, cannot be sued in equity, except for the purpose of redemption.

H. B. was entitled for life to a charge on the R. estate, subject to which the charge belonged to Sir G. B. absolutely. H. B. purchased for value the reversionary interest of Sir G. B. in the charge, with knowledge that the rents of the estate were not received by Sir G. B., but by B. as a trustee for some persons to whom Sir G. B. had granted annuities. *Held*, by the Lord Justice TURNER, affirming the decision of the Master of the Rolls (*dubitante* the Lord Justice KNIGHT BRUCE), that H. B., knowing that the rents were received by B., was bound to inquire on whose behalf he received them, and having made no inquiry must be deemed to have had notice of the rights of the persons for whom B. was a trustee, and that, therefore, the executor of H. B., after her death, could not, during the life of Sir G. B., set up the charge against the three annuitants. — *Knight v. Bowyer*, 421.

See CONVERSION.

TRUSTEE ACT, 1850. See LUNATIC. 1.

TRUSTEES.

1. A mortgage was made for securing the re-transfer of a sum of stock to the trustees of a will. The third share of a *cestui que trust* in the stock was afterwards by his marriage settlement vested in trustees, who had power to give receipts, to invest in government or real security, and to vary investments. Part of the mortgaged estate was afterwards sold for less than the value of the stock lent, and one-third of the price was paid in cash to the trustees of the marriage settlement: *Held*, that the estate was not discharged, \* there being no evidence that the cash had been duly invested, or that the trustees received cash instead of stock, in order to invest on real security.  
\* 749

*Sembly*, that if the purchase-deed had contained a recital that the trustees of the settlement had determined to invest the money on real security, they need not have received it in stock, but their receipt for it in cash would have been a good discharge. — *Pell v. De Winton*, 13.

2. Property was assigned to the plaintiff (who was known to the assignor to be an auctioneer, though not described in the deed as such), upon trust to sell by public auction or private contract, and out of the sale moneys to pay the costs, charges, and expenses of preparing for, making, and completing such sales, "including the usual auctioneers' commission": *Held*, that the plaintiff, if he acted as auctioneer at the sale, could retain his own commission. — *Douglas v. Archbutt*, 148.

TRUSTEES (PURCHASE BY). See ASSIGNEES IN BANKRUPTCY.

ULTRA VIRES. See CANAL COMPANY.

UNCERTAINTY. See LEASE. WILL.

#### VENDOR AND PURCHASER.

1. Particulars of sale described Lot 5 as consisting of a leasehold house, No. 20, of a certain description, with a yard, at the end of which was a coach-house and stable, and small yard beyond, with extra stable; and stated, that the house was occupied by W., the yard, coach-house, &c., by H. Lot 6 was described as a leasehold house, "No. 21, adjoining Lot 5, and of similar design and accommodation. Is now and has been for years in the occupation of T." The two houses were built on adjoining strips of land, each held under a separate lease. The small yard and extra stable lay behind No. 21, and were comprised in the lease of Lot 6. The occupations were as stated in the particulars. The plaintiff purchased Lot 5, the defendant H. Lot 6. The plaintiff took an assignment from the vendor of the property in the lease of Lot 5, and no more. H., on the following day, took an assignment of all the property comprised in the lease of Lot 6, thus obtaining the legal estate in the small yard and extra stable.

*Held*, that the plaintiff was entitled to an assignment from H. of the small

yard and extra stable, for that, according to the true construction of the particulars, H. had not contracted to purchase them, but the plaintiff had.

*Held*, that the vendor was not a proper party to the suit. — *Leuty v. Hillas*, 110.

\* 2. A vendor insisted on executing the purchase deed without the purchaser or any agent of the purchaser being present, and also insisted on the purchase-money being paid not to himself but to his solicitor or his solicitor's clerk, to neither of whom he had given any written authority to receive it. On the purchaser declining to complete the purchase in that mode, the vendor brought an action against him for the purchase-money: *Held*, that the vendor ought to pay all the costs of a suit instituted by the purchaser for the specific performance of the contract and for an injunction to stay the proceedings at law.

*Semble*, that there is no rule that the purchaser may in all cases require the purchase deed to be executed in the presence of himself or his agent, and the purchase-money to be paid directly to the vendor, but that he may so require in the absence of special circumstances rendering a different course proper. — *Viney v. Chaplin*, 468.

#### VESTING ORDER.

The 22d section of the Trustee Act, 1850, authorizes an order vesting the right to receive future dividends.

One of four trustees of a sum of stock being out of the jurisdiction, an order was made under the above section vesting the right to receive the dividends in the other three, but was, on appeal by the bank, varied by restricting it to the dividends to accrue due during the joint lives of the three. — *Re Peyton's Settlement*, 290.

#### VOLUNTARY SETTLEMENT.

Previously to a contemplated marriage, the intended husband and wife went to a solicitor to have a settlement prepared of some railway stock of which the intended wife was the registered proprietor, but which was subject to a mortgage, and the certificates of which were in the hands of the mortgagee. The solicitor not being able to prepare the settlement before the time fixed for the marriage, the husband told the wife that it would be equally good if made afterwards, and no settlement or agreement for a settlement was made in writing before the marriage. Shortly after the marriage a settlement was executed, whereby the husband covenanted to invest part of the proceeds of the stock upon trusts for the benefit of his wife and children. He sold the stock, paid off the mortgage, and invested the stipulated amount according to his covenant: *Held*, —

1. That the settlement was voluntary and fraudulent, and therefore void as against creditors.
2. That the wife had no equity to a settlement. — *Warden v. Jones*, 76.

#### \* WAIVER.

B. died equitably indebted to A. After B.'s death, it was arranged

between C., who was his executor and devisee, and A., who admitted that he took under the devise real assets enough to pay B.'s debts, and that he was liable to pay A.'s claim out of them, should not be called upon for immediate payment of the principal, but should pay interest on it. A. afterwards filed a bill to enforce payment either by C. or out of B.'s assets, and obtained a decree against C. personally for payment of the money due, which decree reserved further consideration and liberty to apply, but did not give any remedy against the assets. A suit was subsequently instituted by a mortgagee, to whom C. had mortgaged one of the devised estates, and the estate was sold in this latter suit.

*Held*, that A. had not, by obtaining a personal decree against C., lost her rights as a creditor against the assets of B., and that her claim against the surplus proceeds of the sale in the mortgagee's suit had priority over that of a judgment creditor of C., though the judgment was prior in time to the decree in A.'s suit.

*Sembler*, if necessary, A. might in her own suit, under the reservation of further consideration and liberty to apply, have enforced her claim against B.'s assets.

Whether the decree in A.'s suit was right in ordering payment by C. personally, *quare?* — *De Sorbein v. Bland*, 158.

See PARTNERSHIP.

WIFE (MORTGAGE BY). See HUSBAND AND WIFE, 2.

WILL.

1. A testator gave realty and personalty to his son when he should have attained twenty-one, subject to an annuity to the testator's widow, and then proceeded thus, — "should the hand of death fall on my widow and son, and my having no children or my son any issue, my will is, that, should he leave a widow, she shall receive the annual sum of 50L during her widowhood out of my real estates, the residue then to be equally divided, after paying such legacies as I may hereafter name, the division of property to be between my late brother's surviving children and my sister I. W.'s children, my sister R. S.'s children and my nieces G. B. and S. S., they paying all my son's just debts, funeral expenses and demands, or my wife's, should she be the longest liver : " *Held*, that the executory gift was not too uncertain to cut down the absolute gift to the son, but that on his death, without having had any issue, such of the children of the testator's specified brothers and sisters as were living at the testator's death, together with his specified nieces, were entitled.

\* 752 *Sembler*, that the condition as to "payment of the son's or widow's debts would be inoperative. — *Randfield v. Randfield*, 57.

2. A testator devised his real estate to his wife for life, with remainder to his son for life, and then in undivided shares amongst his own brothers and sisters (by name), and certain brothers and sisters (by name) of his wife, and the children of a deceased brother and sister of his wife. The will contained a direction that "in case any of my said brothers

and sisters, or the brothers and sisters of my said wife now living, shall happen to die in the lifetime of my said wife and son or of the survivor of them," leaving children, the share of each person so dying should go to his child or children. One of the testator's brothers named in the gift died before the will was made.

*Held*, upon the context of the will, that the words "now living" were confined to brothers and sisters of the wife.

*Held*, also, that the words "shall happen to die" included the case of the brother named in the will, but dead at the date of it, and that the gift in favour of his children took effect. — *Hannam v. Sims*, 149.

See PRACTICE, 3.

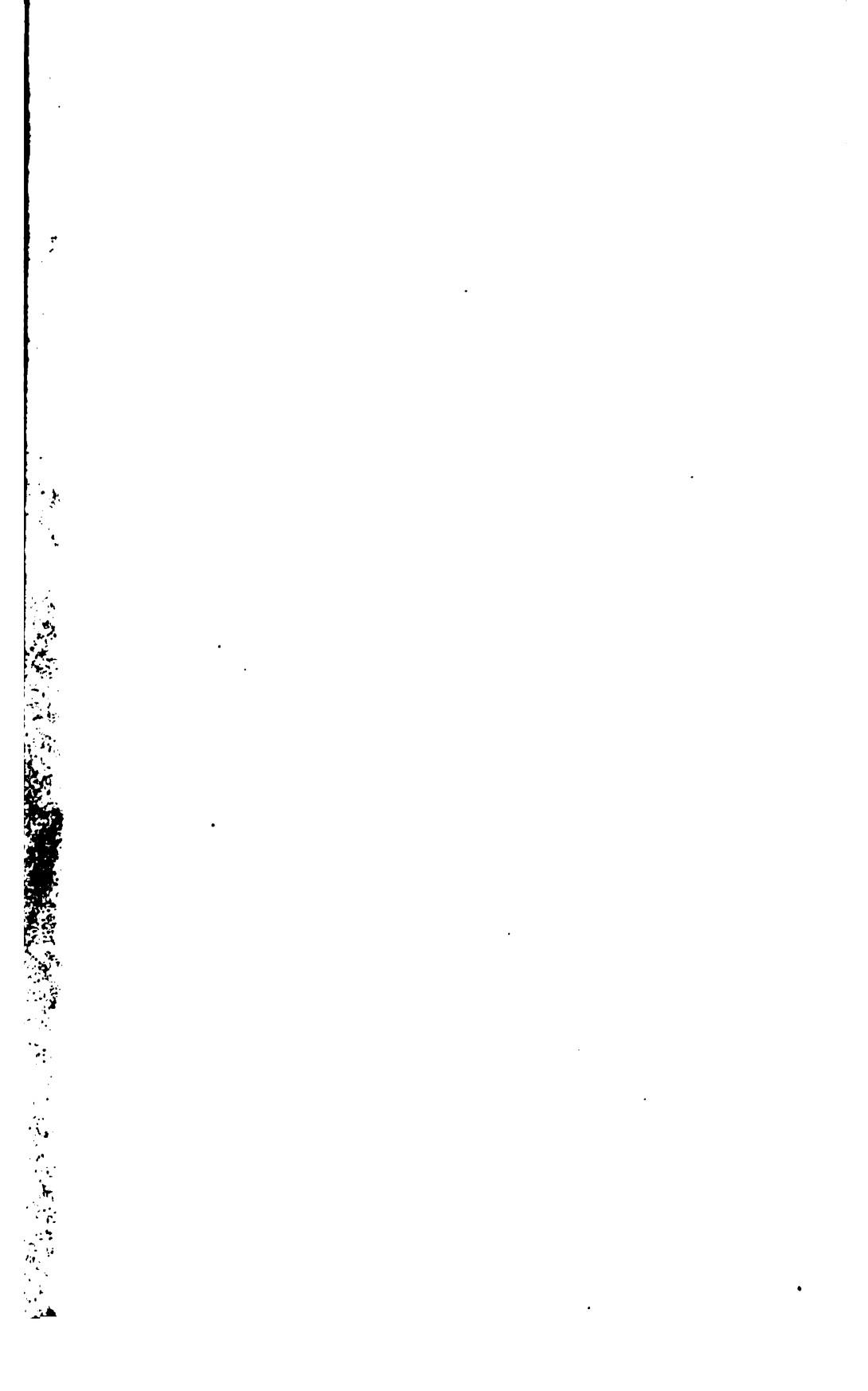
WINDING UP. See JOINT-STOCK COMPANY.

WITNESS. See PRACTICE, 9.

WORKS. See BOARD OF WORKS.

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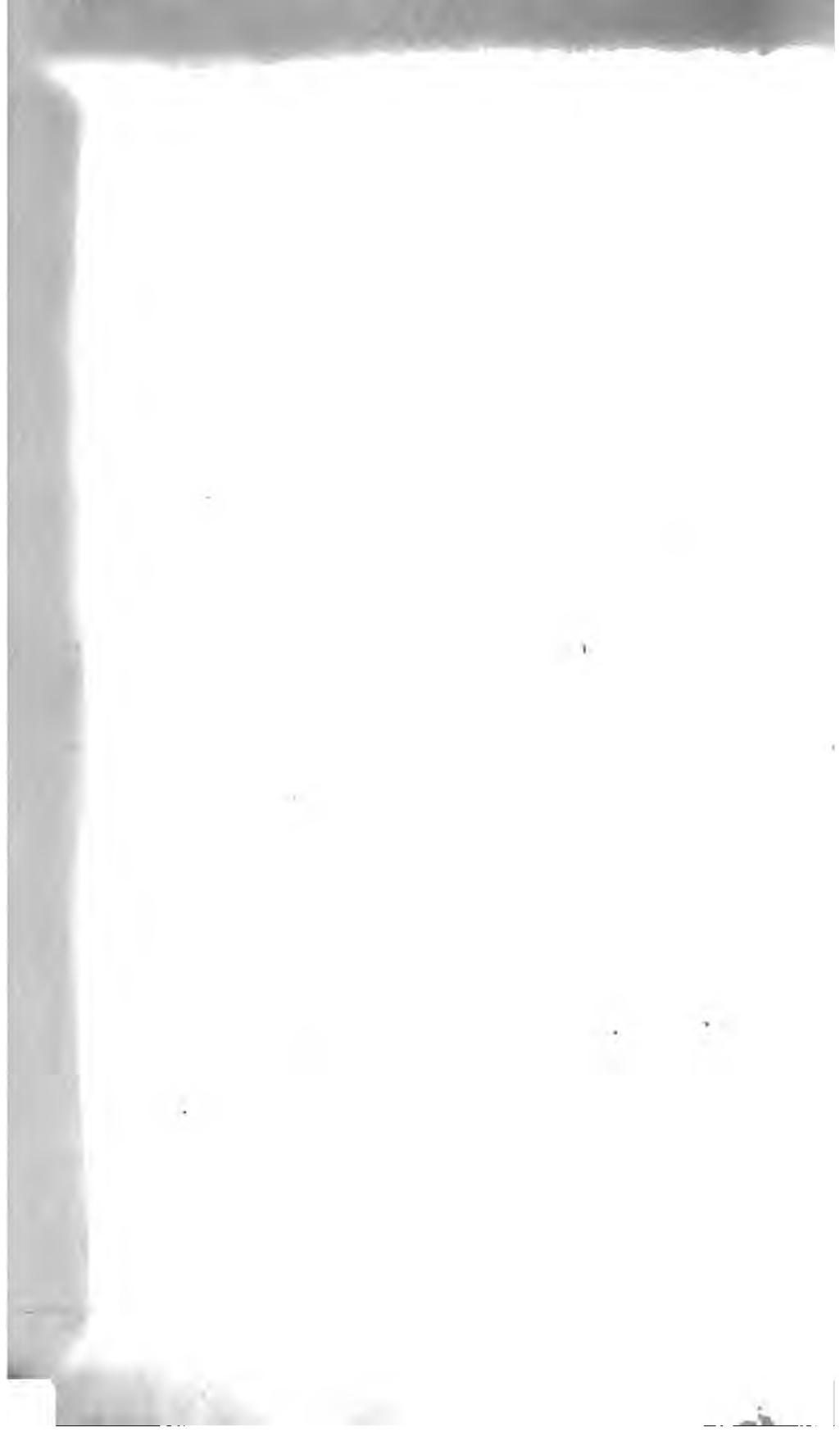












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